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# STATES OF JERSEY



## **EMPLOYMENT: DISCIPLINARY AND GRIEVANCE PROCEDURES – CODE OF PRACTICE – WHITE PAPER – SEPTEMBER 2013 (R.109/2013) – SUMMARY OF CONSULTATION RESPONSES AND REVISED CODE OF PRACTICE**

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**Presented to the States on 14th January 2014  
by the Minister for Social Security**

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**STATES GREFFE**



# Summary of Responses

## SUMMARY OF CONSULTATION DETAILS

The purpose of the consultation was to invite written comments on a revised 'Disciplinary and Grievance Procedures' Code of Practice prior to the Minister formalising the Code of Practice by Order under the Employment (Jersey) Law 2003 (the "Employment Law").

A revised 'Disciplinary and Grievance Procedures' Code of Practice was prepared following consultation undertaken by the Employment Forum earlier in 2013. The purpose of the 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.

The Minister was grateful to receive detailed comments on the revised Code of Practice from stakeholders. Having considered the comments, the Minister agreed to a number of improvements and has prepared a final version of the Code of Practice, which will be publicised and made by Order as soon as possible.

### 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**

The Minister had directed the Forum to review and circulate the ‘Disciplinary and Grievance Procedures’ 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 Minister presented that recommendation to the States on 6th August 2013<sup>2</sup>.

The Forum had concluded that, rather than modifying and revising individual elements of the Code of Practice, it would be beneficial to provide a new simplified set of procedures. 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>3</sup>

### **Minister’s consultation**

Having considered the Forum’s recommendation, the Minister consulted JACS, and decided to make some further revisions to the draft Code of Practice, which were shown as tracked changes in the draft Code of Practice that was circulated for further public consultation.

The Minister invited representations on the revised Code of Practice, as required by the Employment Law, by publishing a White Paper and placing a notice in the Gazette on 12th September 2013. Details of the consultation were placed on the States website, sent to those on the States’ public consultation register; and the Employment Forum circulated the White Paper to its consultation database (which includes around 300 individuals, organisations and associations). Consultation closed on 7th November 2013.

The purpose of the consultation was to obtain the views of stakeholders and consider any comments received to ensure that the proposed Code of Practice would be fit for purpose before making the Code of Practice by Order under the Employment Law.

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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> R.98/2013 – [www.statesassembly.gov.je/AssemblyReports/2013/R.098-2013.pdf](http://www.statesassembly.gov.je/AssemblyReports/2013/R.098-2013.pdf)

<sup>3</sup> Page 15 of the Forum’s recommendation

## OVERVIEW OF CONSULTATION RESPONSES

Comments were received from the following respondents –

1. Deputy R.G. Le Hérisier of St. Saviour
2. Anonymous employer (private sector)
3. Anonymous Human Resources professional (private sector)
4. Anonymous Human Resources Professional (public sector)
5. Anonymous respondent
6. Gino Risoli
7. Darius Pearce
8. Jersey Advisory and Conciliation Service (JACS)
9. Huw Thomas, Carey Olsen
10. CIPD Jersey Group
11. Jersey Chamber of Commerce.

Some constructive comments were received, including that the revised Code of Practice is an improvement. None of the respondents indicated that the revised Code of Practice is not an improvement. General comments included –

*“We would like it noted that we feel that these codes are a lot more user friendly than previously, however we have some concerns which we hope that the minister will consider and amend the code before making the Code of Practice by Order under the Employment Law.”* (CIPD Jersey Group)

*“These new revised codes are much easier to understand and read. However there are elements that are conflicting.”* (Jersey Chamber of Commerce)

*“I think the updated code looks good and I don't have any further comments on it.”* (Anonymous Human Resources professional, private sector)

*“JACS view is that the Disciplinary and Grievance Procedures Code of Practice provides a good framework for employers in understanding what is required when considering fair processes. The amendments give more clarity to areas that still cause considerable concern to many employers which can result in Tribunal claims. Having said this we would be happy to look at other responses to the consultation document as a way of ascertaining whether we may have missed something, or if other responses indicate that the ‘Code’ is still difficult to understand or put into practice.”* (JACS)

The Minister has consulted further with JACS in considering the detailed comments that were provided by respondents during consultation.

## **MINISTER/DEPARTMENT'S RESPONSE TO CONSULTATION**

The Minister is very grateful for the responses received during consultation. The Minister considered the arguments and suggestions put forward by each respondent and reached a decision in each case. The responses are set out in the summary of responses table on pages 7 to 23.

The further changes that the Minister has decided to make to the Code of Practice as a result of the comments received are described in the table and the final version of the revised Code of Practice is included at the attached **Appendix**.

The Minister considers that the Code of Practice is a great improvement. The simplified, more streamlined procedure is expected to 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>4</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 will make the revised Code of Practice by Order and it will take effect from 1st April 2014. This will allow time for employers to make any necessary changes, for example to their procedures.

## **SUMMARY OF RESPONSES**

The consultation responses are provided in the table on pages 7 to 23. Where respondents suggested changes to the revised Code of Practice, the table includes the Minister's response to each of those comments.

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<sup>4</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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Subject/reference	Respondent's comment	Minister's response
<p><b>Paragraph 1</b> 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.</p>	<p>“We do not support the use of this Code of Practice in capability matters. As an employer operating not only on Jersey but also within the UK and Ireland, we aim to be consistent across all the territories in which we operate and therefore make a clear distinction between the use of the conduct and capability processes, as per best practice/the law in those other territories. Moreover, the underlying reasons for a capability dismissal are normally outside the employee’s control, making the use of a disciplinary process for a capability matter both demoralising and perceptually unfair with a potentially negative impact on the employer brand.” (Employer, private sector)</p> <p>“The code stipulates that disciplinary sanctions can include poor performance and capability issues. However it then goes on to stipulate that it is not intended to cover dismissals based upon the fact that an employee is unable to work because of sickness or injury. This may confuse employers and employees alike as a capability issue can be due to ill health.” (Jersey Chamber of Commerce)</p>	<p>The ACAS Code of Practice on ‘Disciplinary and Grievance Procedures’ (2009) states that “<i>Disciplinary situations include misconduct and/or poor performance</i>”. This wording accurately describes the intended position in Jersey and so the Code of Practice has been amended to state that “<i>Part 1 of this Code of Practice applies in disciplinary situations which can include misconduct and poor performance</i>”. This will minimise confusion and will provide the requested consistency for employers that operate across the UK and Jersey.</p>
	<p>The code stipulates that it is not intended to be followed in cases of business re-organisation or redundancy. It would also be useful to include “or the non-renewal of fixed-term contracts on their expiry”.” (Jersey Chamber of Commerce)</p>	<p>The decision has been taken to reflect the scope of the UK Code of Practice and the code now states that “<i>This Code of Practice is not intended to be followed in cases of redundancy dismissals or the non-renewal of fixed-term contracts on their expiry</i>”.</p>

Subject/reference	Respondent's comment	Minister's response
<p><b>Paragraph 3</b> 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.</p>	<p>“What is reasonable includes that reasonableness will vary depending on the circumstances of the case and the size of the employer. Given Article 64(4)(a) of the principal Law which also states the “administrative resources” Chamber believes it would be useful to include this part too.” (Jersey Chamber of Commerce)</p>	<p>The Code of Practice has been amended to state that <i>“What is reasonable will vary depending on the circumstances of the case including the size <b>and administrative resources</b> of the employer”</i>.</p>
<p><b>Paragraph 4</b> 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.</p>	<p>“The codes are there as guidance and surely only an enquiring court or tribunal can make the decision to render the dismissal unfair.” (Jersey Chamber of Commerce)</p>	<p>The paragraph has been amended to clarify as follows: <i>“The provisions of this Code of Practice are designed to ensure that these fundamental principles of fairness are followed by employers of all sizes. <b>In determining any complaint, the Tribunal or a court will take this into account, along with any other information that is relevant to the case.</b> A failure to observe any of the above fundamental principles may result in the Tribunal or a court deciding that a dismissal was unfair.”</i></p>
<p><b>Paragraph 7</b> 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.</p>	<p>“This wording seems to contradict clause 17. If an employer has decided that a written warning or even dismissal is appropriate, how can they be going in with an open mind? We would suggest that “if dealing with matters informally has not worked then the matter should be progressed to a formal process.”” (CIPD Jersey Group)</p> <p>“The way this is worded contradicts paragraph 17 and indeed the whole open-minded fairness argument.” (Jersey Chamber of Commerce)</p>	<p>This paragraph was not intended to pre-empt the outcome of a disciplinary hearing, but to indicate to an employer when a matter might be formal rather than informal. The code is amended to clarify that, <i>“Where an employer considers there to be a possibility that disciplinary action might be taken in any particular case (e.g. a written warning or dismissal), it is important that a formal disciplinary process is followed to ensure that the matter is dealt with fairly.”</i></p>

Subject/reference	Respondent's comment	Minister's response
<p><b>Paragraph 9</b> Formal disciplinary action should not be taken against an employee without a fair investigation first taking place.</p>	<p>“This talks about a fair investigation. However, existing case law all talk about reasonable not fair. “Burchell” is probably the most famous unfair dismissal case. It states that the test of whether a dismissal for misconduct is fair is not whether the employee was guilty, but whether the employer genuinely believed that they were, had reasonable grounds for that belief and had arrived at it after a <u>reasonable</u> investigation [Our emphasis].” (Jersey Chamber of Commerce)</p>	<p>Paragraph 12 is amended to provide that “A <i>fair investigation should be reasonable given the circumstances and sufficiently thorough, particularly when key facts are in dispute.</i>”</p>
<p><b>Paragraph 10</b> 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.</p>	<p>“The employee must be asked – it cannot be optional.” (Deputy R.G. Le Hérisser of St. Saviour)</p>	<p>The paragraph is amended so that “A <i>fair investigation will require the collection of evidence about the alleged misconduct which might include appropriate documentation and the holding of investigatory meetings with relevant individuals within the business. Where reasonably practicable, this will require an investigatory meeting with the employee who is the subject of the allegation.</i>”</p>
<p><b>Paragraph 12</b> 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.</p>	<p>“We would like the following wording to be included as an additional point: “An investigation needs to be reasonable in all the circumstances”.” (CIPD Jersey Group)</p> <p>“This talks about a fair investigation. However, existing case law all talk about reasonable not fair. (Jersey Chamber of Commerce)</p>	<p>Paragraph 12 is amended to provide that “A <i>fair investigation should be reasonable given the circumstances and sufficiently thorough, particularly when key facts are in dispute.</i>”</p>

Subject/reference	Respondent's comment	Minister's response
<p><b>Paragraph 13</b> When the investigation has been completed, the employer needs to decide whether there is sufficient evidence to hold a disciplinary hearing.</p>	<p>“We believe this should be expanded to say that the investigating officer needs to decide if there is a case for the employee to answer and on what grounds.” (CIPD Jersey Group)</p>	<p>Paragraphs 13 and 14 have been amended to address the comments on these two paragraphs. In addition, paragraph 9 notes that more detail about the investigation process is provided in JACS guidance, rather than the Code of Practice.</p>
<p><b>Paragraph 14</b> 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.</p>	<p>“Notice of a disciplinary hearing should be given in writing.” (CIPD Jersey Group)</p> <p>“Given that many employers in Jersey are small and many do not have dedicated HR professionals, Chamber believes that these paragraphs should go a little further and stipulate that if there is a case to answer, the employee should be notified in writing and this notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare. In addition, the employee should be advised of the date, time and place of the hearing.” (Jersey Chamber of Commerce)</p>	<p>Paragraphs 13 and 14 have been amended as follows: <i>“13. If it is decided that there is a disciplinary case to answer and a hearing is to be held, the employee should be given adequate notice of the hearing in writing, including the date, time and place of the hearing.”</i></p> <p><i>14. The notice to the employee should contain sufficient information about the alleged misconduct or poor performance and its possible consequences, as well as copies of all the written evidence that the employer intends to rely on. This should be given to the employee within sufficient time before the hearing to enable the employee to answer the case. The same written evidence should be provided to the person who will lead the hearing.”</i></p>
<p><b>Paragraph 15</b> 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.</p>	<p>“Drop “if possible”.” (Deputy R.G. Le Hérisser of St. Saviour)</p>	<p>Paragraph 15 (now paragraph 16) has been amended so that <i>“The hearing should be conducted in private, away from other employees”.</i></p>

Subject/reference	Respondent's comment	Minister's response
<p><b>Paragraph 16</b> 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.</p>	<p>When you talk about a copy of the results what do you mean? for clarity it should state "Prior to the hearing it would normally be appropriate to provide copies of any written evidence (which may include witness statements) to both the employee and the disciplinary chair/panel." (CIPD Jersey Group)</p> <p>"By stipulating that the employee should be given a copy of the <b>results</b> of the investigation, employers or indeed investigators may think they have to give an outcome rather than establish fact." (Jersey Chamber of Commerce)</p>	<p>Having taken into account the comments, paragraph 16 has been deleted as this is now dealt with in the revised paragraph 14.</p> <p><i>The new paragraph 16 notes that "More information is provided in the JACS guide to Disciplinary Investigations.</i></p>
<p><b>Paragraph 21</b> 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.</p>	<p>"In order to create balance and a level playing field these provisions should also explicitly apply to any questioning and cross-examination of managers and witnesses by the employee and their representative." (Anonymous Human Resources Professional, public sector)</p>	<p>Paragraph 21 has been amended to: <i>"The hearing must be conducted in a way which allows the employee to answer the case. If questions are asked of anyone present during the hearing, the questions should genuinely be aimed at discovering the facts".</i></p>
<p><b>Paragraph 23</b> 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.</p>	<p>"I have known it to be impossible to secure "agreement" to such notes/minutes – it is more reliable to place an obligation on the Chair of the panel to ensure that as reasonable a record as possible is made – "agreement" is unrealistic I am afraid." (Anonymous Human Resources Professional, public sector)</p>	<p>The following sentence has been added to paragraph 23: <i>"If agreement cannot be reached on the content of the note or minute, then both versions of the account should be placed on file."</i></p>
<p><b>Paragraph 25</b> 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.</p>	<p>"I am very surprised at losing the reference to "mitigating circumstances" – there are many classic cases in the body of UK and EEC law where these are vital and compelling." (Anonymous Human Resources Professional, public sector)</p>	<p>This was removed to simplify the language of the Code of Practice (Plain English). The term 'mitigating circumstances' was thought to be overly technical and it is considered that the same intention is expressed more simply as revised. No change.</p>

Subject/reference	Respondent's comment	Minister's response
<p><b>Paragraph 28</b> 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.</p>	<p>“To be included within a contract has been deleted, are you saying that it does not need to be included in contractual terms? The above words have been replaced by “<i>may be offered instead of dismissal</i>” firstly, Chamber believes that sanctions given to an employee should be of the employer’s choice – not offered – as you could then be left with a situation of non-acceptance. This new wording could also result in more dismissals occurring.” (Jersey Chamber of Commerce)</p> <p>“You have removed the clarification for employers that this needs to be in their contracts to be able to demote, etc. – is this no longer the case?” (CIPD Jersey Group)</p> <p>“In my view, it is important to emphasise that alternative sanctions such as demotion or suspension without pay may only be imposed provided there is contractual authority to do so – otherwise such action may be in breach of contract (unless the employee accepts such a sanction being imposed). For example, demoting an employee without sufficient reason may constitute a breach of mutual trust and confidence, but a demotion is in any event likely to be a breach of the express terms of the contract, unless it is specifically permitted in the contract or the employee gives their consent to it (<i>Hilton v Shiner Ltd. Builders Merchants [2001] IRLR 727</i>). The final sentence of para. 28 could therefore read: “Employers may decide to impose other sanctions, such as demotion or a reduction in salary where contracts permit such sanctions. If the contract does not permit demotion or</p>	<p>The relevant sentence has been replaced with “<i>Unless specifically provided for in a contract of employment, sanctions, such as demotion, a reduction in salary or a loss of seniority should be agreed with the employee, otherwise such action might amount to a breach of contract which could result in a claim to the Tribunal or a court</i>”.</p>

Subject/reference	Respondent's comment	Minister's response
	<p>salary reduction, the employer may be in breach of contract unless the employee agrees to the sanction being imposed.”” (Huw Thomas, Carey Olsen)</p> <p>“The statements here are most welcome – I can however imagine circumstances where a demotion or downgrading may be defined as a dismissal from post “A” and re-engagement into post “B” and therefore deemed to be a matter for the JET to decide. This could create as much work for JET as it avoids.” (Anonymous Human Resources Professional, public sector)</p>	
<p><b>Paragraph 32</b> 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.</p>	<p>“Whilst we would obviously never treat an expired warning as ‘live’, we would not advocate removing them from personnel files in case a pattern of behaviour could be demonstrated in the future and influence a disciplinary outcome as an additional (but not determining factor) as per the UK Employment Tribunal case <i>Airbus UK Ltd v Webb</i> (2008).” (Anonymous employer, private sector)</p> <p>“It is impractical to request employers to remove disciplinary notes, letters, etc. from a personnel file once the warning is no longer in play. For various reasons, documents of this nature do need to be held on file (but not referred too), especially if the employee brings a claim later, for example personal injury. Removing it would mean that the employer would not have the paperwork to defend such a claim.” (CIPD Jersey Group)</p> <p>“A warning should not be removed from the file even when expired. There are other laws and regulations that come into play</p>	<p>The words “<i>and removed from the employee's personal file</i>” are removed from paragraph 32.</p>

Subject/reference	Respondent's comment	Minister's response
	<p>within the employment context e.g. H&amp;S duty of care and should an employer give a warning about wearing personal protective equipment then that warning should remain on file in case of a defence for any potential personal injury claims which might only arrive at the employers desk after 3 years. This is paramount.” (Jersey Chamber of Commerce)</p>	
<p><b>Paragraph 38</b> 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.</p>	<p>“This paragraph could emphasise more explicitly that the commission of an act of gross misconduct will not necessarily make a dismissal fair – the employer must follow a fair procedure, including considering any mitigating factors advanced by the employee or known to the employer, such as any explanations for the employee’s actions, the employee’s long service, the consequences of dismissal and any previously unblemished record. <i>(Brito-Babapulle v Ealing Hospital NHS Trust UKEAT/0358/12.)</i>” <i>(Huw Thomas, Carey Olsen)</i></p>	<p>Paragraph 38 is amended to <i>“However, even in cases of gross misconduct, the employer should still follow a fair procedure because an act of gross misconduct does not necessarily make a dismissal fair. 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.”</i></p>
	<p>“I would make an exception if the employee admits “guilt” after due reflection. Obviously this must be documented.” (Deputy R.G. Le Hérisier of St. Saviour)</p>	<p>Such an exception could create problems, including the potential for coercion. No change.</p>
<p><b>Paragraphs 44 and 45</b> 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.  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</p>	<p>“To ensure a fresh review, could an employer in a small company, with the employee’s agreement, bring in a third party such as a senior manager from elsewhere?” (Deputy R.G. Le Hérisier of St. Saviour)  “A more senior level of manager may not always be practical, for example, would a director be able to chair the disciplinary hearing and another director not be able to chair the appeal?” (CIPD Jersey Group)</p>	<p>Paragraphs 44 and 45 are amended to reflect the comments and to clarify that this may also be an issue for reasons other than the size of the business – <i>“44. The appeal should be conducted by a more senior level of manager than presided over the disciplinary hearing, if possible, or at least someone who has not previously been involved in the case.”</i></p>

Subject/reference	Respondent's comment	Minister's response
arguments that may be presented.	"Appeals may not always be held by a more senior person, indeed in a case where there are two directors, one could attend to the hearing whilst the other to the appeal. Rather than say "senior person" you could say "someone not previously involved," again this would need to be subject to the size and resources of the employer." (Jersey Chamber of Commerce)	
<p><b>Paragraph 46</b> 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.</p>	"We would recommend that the appeal hearing is adjourned prior to an outcome being given, therefore we would like the follow clause added to both sections of appeal. "Once the appeal has been heard, the person conducting the appeal should adjourn the hearing to consider the information before making a decision." " (CIPD Jersey Group)	<p><i>Paragraphs 45 (and 60) are amended:</i></p> <p><i>"45. This may not be possible, but an appeal should still be offered so that the employer (or the person nominated by the employer) has a chance to reconsider the action that has been taken and listen to any fresh arguments that may be presented. Once the appeal has been heard, the person conducting the appeal should adjourn the hearing to consider the information before making a decision."</i></p>
	"This states that an appeal hearing may involve a complete rehearing of the case, Chamber would like the following wording added "depending upon the grounds of the appeal". It should also be stated here that an adjournment is required before any decision on the appeal is given." (Jersey Chamber of Commerce)	Paragraph 46 is amended to: <i>"It may amount to a complete rehearing of the case, if appropriate..."</i>
<p><b>Paragraph 47</b> 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.</p>	<p>"A grievance can be raised by an employee due to the treatment of another employee – it does not always have to be the employer!" (CIPD Jersey Group)</p> <p>"Grievances are not only raised by employees against their employer, they are also raised against other employees." (Jersey Chamber of Commerce)</p>	<p>Paragraph 47 is amended to <i>"Grievances are concerns, problems or complaints that employees raise with their employers."</i></p> <p>Paragraph 2 has also been amended to state that <i>"Part 2 of the Code of Practice applies in grievance situations which</i></p>

Subject/reference	Respondent's comment	Minister's response
		<i>arise where employees raise concerns, problems or complaints with their employer</i> ".
<p><b>Paragraph 50</b> 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.</p>	<p>"My recent experience in the UK suggests that it is more and more common to avoid the use of "hearings" as the label in grievance processes so it seems retro to replace the more neutral "meetings" with the more formal/adversarial: "hearings" as appears to be the case in this document. It seems a backward step." (Anonymous Human Resources Professional, public sector)</p>	<p>The term 'hearing' was already used throughout most of this code. References to a 'meeting' were removed to clarify that the code relates to formal disciplinary and grievance hearings, not informal meetings. 'Formal' does not necessarily mean 'adversarial'. Whilst employers may be using the term 'hearings' less frequently in practice, the ACAS code uses both terms without defining a difference between the two, which may be confusing. The statutory right to representation only arises in relation to a 'disciplinary/grievance hearing'. To call a grievance hearing a meeting may inadvertently imply that it is different or of less importance. No change.</p>
<p><b>Paragraph 54</b> 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.</p>	<p>"We do not see the need for a separate investigation officer in a grievance case. A disciplinary needs to have three independent decision-makers to ensure the requirements of natural justice are met when a dismissal or other sanction is contemplated ... In a grievance, the matter is instigated by the employee, not management. The purpose of the process is simply to look at the facts presented by the employee and make sufficient investigations to decide whether or not to uphold their complaint. We believe one independent manager is sufficient to gather, review and decide on the facts. If there has been any bias on the part of the</p>	<p>As far as possible, this should be undertaken by different people. The code already accepts that the requirements may be different in the case of a grievance hearing and particularly for smaller employers. The paragraph is amended to "<i>If possible the investigation will be carried out by a manager who will not be conducting the grievance hearing itself</i>".</p>

Subject/reference	Respondent's comment	Minister's response
	hearing manager, this can be rectified at appeal." (Anonymous employer, private sector)	
<p><b>Paragraphs 56 and 57</b> 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.</p> <p>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.</p>	<p>"Appeals should be available against the first decision of a grievance hearing even if the grievance is upheld. Our suggestion would be to include a new paragraph 58 which deals with appeals and take the sentence at the end of 57. Possible wording "Where an employee feels their grievance has not been satisfactorily resolved they should have the right of appeal"." (Jersey Chamber of Commerce)</p>	<p>Paragraphs 58 and 59 have been replaced, as follows:</p> <p><i>"58. The employee should be informed of the right to appeal if he or she is not content with the decision.</i></p> <p><b>The right to appeal</b> <i>59. An employee who feels that their grievance has not been satisfactorily resolved should advise the employer in writing of the grounds for their appeal. An appeal should essentially abide by the same principles of fairness as a grievance hearing – including the right of the employee to be represented."</i></p>
<p><b>Paragraph 60</b> The manager conducting the appeal should consider carefully the points made by the employee before reaching a decision.</p>	<p>We would recommend that the appeal hearing is adjourned prior to an outcome being given, therefore we would like the follow clause added to both sections of appeal "Once the appeal has been heard, the person conducting the appeal should adjourn the hearing to consider the information before making a decision." (CIPD Jersey Group)</p>	<p>Paragraph 60 is amended as suggested:</p> <p><i>"60. The <b>person</b> conducting the appeal should consider carefully the points made by the employee <b>and should adjourn the hearing to consider the information before reaching a decision."</b></i></p>
<p><b>Paragraph 62</b> Once a grievance has been concluded, the employer may want to give consideration to what actions are needed to improve relationships in the workplace.</p>	<p>"I suggest that this should explicitly refer to and commit the employee too." (Anonymous Human Resources Professional, public sector)</p>	<p>Paragraph 62 is amended to <i>"Once a grievance has been concluded, the employer may want to give consideration to what actions <b>could be taken by the employer and/or the employees to improve relationships in the workplace."</b></i></p>

Subject/reference	Respondent's comment	Minister's response
<p><b>Other comments on the revised Code of Practice</b></p>	<p>“Throughout the codes it talks about employers behaving reasonably and fairly and we believe that employees should be reminded to act the same when going through any process. Issues such as delays, postponements, stress-related concerns, no-shows and, the most common, providing sick notes so the process stalls for an age is something that many employers face on a monthly basis.” (Jersey Chamber of Commerce)</p>	<p>The introduction to the code has been revised to include reasonable employee behaviour: <i>“In preparing this Code of Practice, the Minister has had careful regard to the need not to burden employers with excessive bureaucracy. 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 and to act reasonably throughout the process.”</i></p>
	<p>“The grievance procedure is for individual issues and should be not used for collective issues, collective grievances should be dealt with in accordance with the employers’ collective dispute procedures.” (Jersey Chamber of Commerce)</p>	<p>A new paragraph is added similar to that included in the ACAS Code of Practice: <i>“Collective grievances 63. This Code of Practice does not apply to grievances raised on behalf of two or more employees by a representative of a recognised trade union where there is a trade union recognition agreement in place with the employer. These grievances should be dealt with in accordance with the employer’s collective grievance process or the recognition agreement, as appropriate.”</i></p>
	<p>“It should be a disciplinary offence to <b>fail to comply</b> with the Code of Practice. So that the codes are properly enforceable. If staff ignore the codes under the law there should be sanctions, otherwise what is the point?” (Anonymous)</p>	<p>This is a Code of Practice, not law, and so we cannot create an offence. The code must be taken into account by the Tribunal or a court where it is relevant to any proceedings. No change.</p>

Subject/reference	Respondent's comment	Minister's response
	<p>“There should be the right of <b>appeal</b> by a complainant, e.g. third party complaint against a staff member, dealt with, etc., then third party (other member of staff or member of the public) needs to be notified and have right of attendance at hearing, and if dissatisfied with any part of the process the right to an independent review of the proceedings and process and outcome.” (Anonymous)</p>	<p>Such a provision is unlikely to be appropriate for this Code of Practice. The intention of revising the 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. No change.</p>
<p><b>General comments on disciplinary and grievance procedures</b></p>	<p>“There should also be some form of oversight to the process of investigating and adjudicating on complaints against <b>senior</b> members of staff. For example in the civil service a complaint against a senior member of staff would be investigated by another senior member of staff. To ensure transparency and fairness to staff member and complainant, as well as the appointed investigator, an independent set of eyes, such as from JACS or a Jurat, or mediation-trained Advocate to ensure fairness and impartiality, and avoid suggestions and inferences of a “closed shop” sticking together.” (Anonymous)</p>	<p>Such a provision is unlikely to be appropriate for this Code of Practice. Employers may have their own internal policies/procedures for such matters. No change.</p>
	<p>“In particular the timetables involved for investigation and adjudication should be rigorously set and enforced. Maybe some corporate central reporting on statistics such as:</p> <ul style="list-style-type: none"> <li>- Complaints made</li> <li>- Grievances lodged</li> <li>- Punctuality and timekeeping</li> <li>- Internal or external</li> <li>- Investigations conducted</li> <li>- Hearings conducted</li> <li>- Outcomes/sanctions</li> <li>- Complainant satisfaction with process (feedback on complaints).</li> </ul>	<p>It is unlikely to be appropriate to include rigorous timetables given that the procedure in the Code of Practice is intended to be appropriate for all sizes of business.</p> <p>A requirement for an annual review is unlikely to be appropriate for a Code of Practice. The intention is to set out a general procedure so that the Code of Practice does not have to be repeatedly reviewed and made by Order. Employers are likely to value</p>

Subject/reference	Respondent's comment	Minister's response
	<p>There then needs an annual review by senior HR professional on whether the revised procedures are working maybe in conjunction with Industrial tribunal, JACS, and local HR private sector professional to ensure best practice.” (Anonymous)</p>	<p>consistency and familiarity with straightforward processes, rather than having to frequently review their own procedures. Any difficulties or concerns that arise in relation to the revised Code of Practice are likely to come to the attention of JACS. No change.</p>
	<p>“The chapman report defined bullying and harassment and this needs to be weaved into the codes of practice so that all employers and HR departments are fully sighted on the definition, as well as the impact on members of staff so affected.” (Anonymous)</p>	<p>Such a provision would be too specific and not appropriate for this code. JACS website includes guidance on bullying and harassment, including a model policy and procedure, an investigation flowchart and guides for employers and employees. No change.</p>
	<p>“First and foremost I must remind you that you are able to correspond with me and others because it is entirely the private sector that pays your wages, even the taxes you pay comes from the private sector. I remind you of this because in many instances I know that this is forgotten by public service sector which includes civil servants. An example of this is that the civil service thinks it is alright that pension benefits exceed those that have to pay for them. Now as long as you pay the private sector the same and put up everyone's taxes, I would feel good about civil servants' demands.</p> <p>Back to this question of grievances.</p> <p>Freedom and relationships are the key. In small companies or businesses there is a relationship between employer and people that work for small businesses. If an employer sacks an employee it is enough to say that they do not see</p>	<p>The intention of revising the 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. No change.</p>

Subject/reference	Respondent's comment	Minister's response
	<p>eye to eye. The employee is free to leave his or her employment at any time. The employer must have that freedom. If you choose to legislate there will always be built in complications in writing legislation, hence this is why you are amending. You cannot legislate for relationships however hard you try. So what I suggest is that this legislation should only apply to businesses that employ over a certain number, a dozen sounds about right.</p> <p>Freedom is the basis of evolution. legislation is forcing people to do something they may not want to do and in this you allow those people not to learn in a very personal way from their mistakes.” (Gino Risoli)</p>	
	<p>“I realise what the intention of the department is with initiatives like this. In effect what you are attempting to do is pass on the responsibility entrusted to you to provide assistance to people in need to employers by preventing them from dismissing employees who continuously break the contracts they have entered into of their own free will. By preventing employees from leaving a position of employment (except to go into other employment) without a ‘good cause’, a good cause being one which will result in an award from the ridiculously biased employment tribunal. This is going to be done without any compensating decrease in the amount of tax extorted from the people (or social security as one form of tax is sometimes euphemistically referred to).</p>	<p>The intention of revising the 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. No change.</p>

Subject/reference	Respondent's comment	Minister's response
	<p>Such measures always accompany the decline of bureaucracies from the Roman Empire in the 5th Century to the present day. The attempt to set things in stone, merely hastens the decline. The one consolation is that those working for the States today will not get to enjoy their pensions as there simply will be no money left, whilst those of us who are not dependant on someone else for our own financial security will not be affected.</p> <p>The Public of Jersey would be far better served by changing the manner and method of awarding such benefits. There is the subsidy paid by the department to Rentiers which does little but over-inflate Jersey property prices. There are the pensions which are paid to the profligate and wasteful older generation who would prefer to see their children and grandchildren starve rather than use their own savings to support themselves in their own old age.</p> <p>I realise that the older generation are more likely to vote and elect the Minister, however as such concerns form the basis of the decisions made I consider the Minister to be in breach of the trust the public has placed in him. He should serve without fear or favour and without regard to the personal consequences for undertaking the responsibilities of trusteeship in good faith.</p> <p>The final consideration is whether this law is in line with the demands of Article 8 of the European Convention on Human Rights. It interferes with the God-given free will of individuals to enter into contracts with each</p>	

Subject/reference	Respondent's comment	Minister's response
	<p>other in whatever form they choose, is that even Lawful? Is it truly necessary in a democratic society to treat all employees like children?</p> <p>This I am afraid is tyranny and oppression. As it says in the preamble to the United Nations Declaration of Human Rights "Man... is compelled to rebellion against tyranny and oppression". The rebellion will take the form of potential employers simply not employing people in Jersey but outsourcing to self-employed people and to other jurisdictions.</p> <p>Congratulations on another waste of taxpayers' money which will damage the economy of Jersey further still. At least it ensures that the revolution will come sooner rather than later, so it's not all bad." (Darius Pearce)</p>	

**APPENDIX****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 businesses are 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 businesses 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 businesses 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. 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 and to act reasonably throughout the process.

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).

*10th January 2014*

**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 the Tribunal or a court that any provision of this Code of Practice is relevant to a question arising in any proceedings, then that provision must be taken 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 DISCIPLINARY AND GRIEVANCE PROCEDURES**

### **When this Code of Practice applies**

1. Part 1 of this Code of Practice applies in disciplinary situations which can include misconduct and poor performance. 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 redundancy dismissals or the non-renewal of fixed-term contracts on their expiry. 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 grievance situations which arise where employees raise concerns, problems or complaints with their employer.

### **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 including the size and administrative resources 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.

4. The provisions of this Code of Practice are designed to ensure that these fundamental principles of fairness are followed by employers of all sizes. In determining any complaint, the Tribunal or a court will take this into account, along with any other information that is relevant to the case. A failure to observe any of the above fundamental principles may result in the Tribunal or a court deciding that a dismissal was unfair.

### **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 an employer considers there to be a possibility that disciplinary action might be taken in any particular case (e.g. a written warning or dismissal), 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 Model Disciplinary Policy) then this should be followed. However, the following standards should be observed whether there is a written procedure in place or not.

### **Conducting a fair investigation**

9. Formal disciplinary action should not be taken against an employee without a fair investigation first taking place. See the JACS guide to Disciplinary Investigation.
10. A fair investigation will require the collection of evidence about the alleged misconduct, which might include appropriate documentation and the holding of investigatory meetings with relevant individuals within the business. Where reasonably practicable, this will require an investigatory meeting with the employee who is the subject of the allegation.
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 reasonable given the circumstances and 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 may be sufficient to render any subsequent dismissal unfair.

**Arranging a disciplinary hearing**

13. If it is decided that there is a disciplinary case to answer and a hearing is to be held, the employee should be given adequate notice of the hearing in writing, including the date, time and place of the hearing.
14. The notice to the employee should contain sufficient information about the alleged misconduct or poor performance and its possible consequences, as well as copies of all the written evidence that the employer intends to rely on. This should be given to the employee within sufficient time before the hearing to enable the employee to answer the case. The same written evidence should be provided to the person who will lead the hearing.
15. In straightforward cases, one or two days' notice of a hearing may be appropriate. However, the more complicated the allegations, and the more detailed the evidence, the longer an employee will need to prepare for the hearing. The period of notice will also give the employee time to find a representative. The law governing the right to a representative is explained in the JACS Model Disciplinary Policy.
16. 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. More information is provided in the JACS guide to Disciplinary Investigation.

**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 answer the case. If questions are asked of anyone present during the hearing, the questions should genuinely be aimed at discovering the facts.
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.

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. If agreement cannot be reached on the content of the note or minute, then both versions of the account should be placed on file.

### **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.
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. Unless specifically provided for in a contract of employment, sanctions, such as demotion, a reduction in salary or a loss of seniority should be agreed with the employee, otherwise such action might amount to a breach of contract which could result in a claim to the Tribunal or a court, where contracts permit such sanctions. If the contract does not permit demotion or salary reduction, the employer may be in breach of contract unless the employee agrees to the sanction being imposed.

### **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 6 months or one year and should be kept on the employee's personal file for that period.
32. Once that time period has expired, then the warning should be disregarded in any future disciplinary proceedings.

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, because an act of gross misconduct does not necessarily make a dismissal fair. 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.
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.

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. The appeal should be conducted by a more senior level of manager than presided over the disciplinary hearing, if possible, or at least someone who has not previously been involved in the case.
45. This may not be possible, but an appeal should still be offered so that the employer (or the person nominated by the employer) has a chance to reconsider the action that has been taken and listen to any fresh arguments that may be presented. Once the appeal has been heard, the person conducting the appeal should adjourn the hearing to consider the information before making a decision.
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, if appropriate, 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. Grievances are concerns, problems or complaints that employees raise with their employers. A reasonable employer will seek to deal fairly with grievances raised by an employee. See the JACS Model Grievance Procedure.
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.

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

#### **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.
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.
54. If possible, 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 businesses, 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.
58. The employee should be informed of the right to appeal if he or she is not content with the decision.

#### **The right to appeal**

59. An employee who feels that their grievance has not been satisfactorily resolved should advise the employer in writing of the grounds for their appeal. An appeal should essentially abide by the same principles of fairness as a grievance hearing – including the right of the employee to be represented.
60. The person conducting the appeal should consider carefully the points made by the employee and should adjourn the hearing to consider the information 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 could be taken by the employer and/or the employees to improve relationships in the workplace.

**Collective grievances**

63. This Code of Practice does not apply to grievances raised on behalf of two or more employees by a representative of a recognised trade union where there is a trade union recognition agreement in place with the employer. These grievances should be dealt with in accordance with the employer's collective grievance process or the recognition agreement, as appropriate.
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