

# **The new Statutory Dispute Resolution Procedures – what they are and how you should apply them**

## Contents

1. Key points p.1
2. Short Guide to the New Law and Procedures p.3
3. Practical tips/information about Amicus policy on how to handle certain questions arising from these changes p.6

## 1. Key Points

- On **1 October 2004** in England, Wales & Scotland (3 April 2005 in Northern Ireland), new Regulations will come into force which will in most situations have a significant effect on what members must do before pursuing a Tribunal complaint and also upon the compensation awarded in most types of Tribunal claims.
- The new Regulations, which are known as the Employment Act 2002 (Dispute Resolution) Regulations 2004, set out statutory grievance and disciplinary procedures which must be followed in various situations. In essence, the new disciplinary procedures require employers to follow a fair procedure before dismissing individuals or taking certain types of disciplinary action and the grievance procedures seek to make employees use internal grievance procedures before bringing certain types of Tribunal claims.
- The consequences of not following the procedures are very significant. If the employer fails to fully follow the disciplinary procedure, any dismissal that occurs will automatically be unfair. Also, a Tribunal will generally **increase the compensation payable to an employee in such circumstances, by between 10 and 50%. If the employee fails to fully follow the disciplinary procedure, his or her compensation may be reduced, generally again by between 10 and 50%.**
- If the employee fails to start the grievance procedure, they **may be stopped from taking a Tribunal claim about that issue at all.** If an employee starts the grievance procedure but then fails to fully follow the procedure in a situation where they should have done so, then although they will be allowed to start a Tribunal claim, their compensation for such a claim will usually be reduced, again by between 10 and 50%. If an employer fails to fully follow the grievance procedure, then an employee's compensation may be increased if their claim is successful. This will mean that formal grievances will have to be taken in many more cases than in the past. (You might wish to warn the company of this before having to raise individual cases.)
- **A new Employment Tribunal claim form will come in to force on 1<sup>st</sup> October, so you should throw away any old ET1s.** No claim will be valid unless on the new form and fully completed. Please pass the claim on to your full time officer as early as possible.

This Guidance contains a short guide to the new procedures, and then a list of important practical tips/ information about Amicus policy on how to handle certain questions arising from these changes. The sample letters referred to are attached, and can be obtained in Word format from your Regional Office.

## A Short Guide to the new law/procedures

### **The Statutory Dismissal and Disciplinary Procedures**

#### When do the Dismissal and Disciplinary Procedures apply?

The Dismissal and Disciplinary Procedures apply to most situations where an employer is takes disciplinary action against or dismisses an employee. Broadly, the Dismissal and Disciplinary Procedures apply to most types of dismissals including those for absence, conduct and most redundancy dismissals. They will also apply to certain types of disciplinary action including disciplinary action based on an employee's conduct or capability, such as suspension without pay or with reduced pay (but not suspension on full pay), withholding overtime, demotion for a capability or conduct reason, and reallocation of duties following ill health. The Dismissal and Disciplinary Procedures do not apply in situations where an employer contemplates issuing a verbal or written warning only, and there are a number of other situations where the Dismissal and Disciplinary Procedures will also not apply.

#### What are the procedures?

There are two types of disciplinary procedure under the Dismissal and Disciplinary Procedures, a standard procedure and a modified procedure. Generally, an employer should use the standard procedure, but there are some dismissal situations (detailed below) where the modified procedure will apply.

##### a) Standard Procedure (3 steps):

- 1) The employer must send the employee a written statement that sets out the allegations against the employee and the employer must invite the employee to attend a meeting to discuss the matter.
- 2) Before the meeting, the employer must inform the employee of the basis of the allegations and must give the employee a reasonable opportunity to consider their response to that information. The meeting must usually take place before any disciplinary action is taken. The employee must take all reasonable steps to attend the meeting and must be informed by the employer after the meeting of the decision and of the right to appeal against the employer's decision.
- 3) If the employee informs the employer that s/he does wish to appeal, the employer must invite him/her to attend a further meeting, which the employee must take all reasonable steps to attend. An outline appeal letter is attached as **sample letter 13**. After the appeal meeting, the employer must inform the employee of the final decision.

The standard procedure applies in most situations where the Dismissal and Disciplinary Procedures apply.

##### b) Modified Procedure (2 steps):

- 1) The employer must send a written statement to the employee setting out the alleged misconduct, the basis for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and the employee's right to appeal against dismissal.
- 2) If the employee informs the employer that s/he wishes to appeal, the employer must invite him/her to attend a meeting, which the employee must take all reasonable steps to attend. After the appeal meeting, the employer must inform the employee of the final decision.

The modified procedure is to be used in very limited circumstances where an employee has been dismissed for misconduct, the employer dismisses immediately after discovering the misconduct, the employer was entitled to dismiss without notice and it was reasonable for the employer to dismiss before conducting an investigation into the allegations against the employee.

## **The Statutory Grievance Procedures ('Grievance Procedures')**

### When do the Grievance Procedures apply?

The Grievance Procedures apply whenever the employee has a complaint about action that the employer is taking in relation to the employee. For example, the Grievance Procedures will apply to complaints about discrimination on grounds of race, sex, disability, sexual orientation, religion or belief or trade union activities or membership, about constructive dismissal, about unlawful deductions from wages, about a failure to pay redundancy payments, about failures under the Working Time Regulations 1998 (e.g. failure to pay holiday pay), and, to a certain extent, complaints about breach of contract. There are a few types of complaint to which the Grievance Procedures do not currently apply.

The Grievance Procedures will also not apply in situations where the Dismissal and Disciplinary Procedures apply, i.e. in a situation where the employee is dismissed, or where the employer takes certain types of disciplinary action against the employee if the grievance is just that that action is being taken. However, if the employee believes that the reason for the disciplinary action is because of an employee's race, sex, disability, sexual orientation, religion or belief, then the Grievance Procedures will apply, in that they will lose out if they do not raise a grievance. Also, if the employee believes that the disciplinary action has occurred for a different reason to that which the employer has relied upon, then the Grievance Procedures will apply to that disciplinary action. You should also advise members to use the Grievance Procedures where they believe that they have been dismissed on grounds of unlawful discrimination or for a reason other than that upon which the employer is relying. You should advise the employee to write a grievance letter, although if the matters raised are essentially part of defending or appealing disciplinary action then the company can deal with the grievance in hearing the disciplinary/appeal, although you should seek recognition that they are doing this.

### What are the steps in the procedure?

Again, there are two types of grievance procedure, a standard procedure and a modified procedure. As with the Dismissal and Disciplinary Procedures, the standard procedure will usually apply to most situations where the Grievance Procedures apply.

a) Standard procedure (3 steps):

- 1) The employee must send a written statement to the employer setting out the grievance. Please see the attached **checklist** and **sample letter 11**.
- 2) The employer must then invite the employee to attend a meeting to discuss the grievance. Before the meeting, the employee must inform the employer of the basis for the grievance and must give the employer a reasonable opportunity to consider their response to this. The employee must take all reasonable steps to attend the meeting and, after the meeting, the employer must inform the employee of his/her decision and notify him/her of the right to appeal.
- 3) If the employee informs the employer that s/he does wish to appeal, the employer must invite the employee to attend a further meeting, which the employee must take all reasonable steps to attend. An outline appeal letter is attached as **sample letter 12**. After the appeal meeting, the employer must inform the employee of his/her final decision.

b) Modified procedure (2 steps):

- 1) The employee must send the employer a written statement setting out the grievance and the basis for it.
- 2) The employer must send a written response to the employee.

The modified procedure can only be used where an employee's employment has ended, the standard Grievance Procedure hasn't been completed, and both parties agree to use the modified procedure.

**If an employee fails to start either the standard Grievance Procedure or the modified Grievance Procedure by sending their statement of grievance to the employer in a situation where the Grievance Procedures apply, then they will be prevented from pursuing a Tribunal complaint about that issue at all. Generally, an employee needs to send their statement of grievance and then wait 28 days before submitting a claim to an Employment Tribunal. As soon as it is clear that the employee may have a Tribunal claim you should contact your Officer, and they should submit the Employment Tribunal application form without waiting the 28 days, or for any relevant appeal.**

Further details are contained in the Green Pages of the September 2004 edition of The Activist. The ACAS Code of Practice gives further advice and ammunition to back you up with difficult employers. The Code can be found on the web at [acas.org.uk](http://acas.org.uk), or a copy obtained from your Regional Office if you cannot access it on the web. We also hope to have it available via the Amicus website shortly.

## **Practical tips/ information about Amicus policy on how to handle certain questions arising from these changes**

The 2 most important tips are:

- keep written records at every stage
- ask your Full Time Officer if you need any advice or assistance. If the officer is not available as your Regional Office to put you on to another officer if the question is urgent.

### **Record keeping**

Make a note of any advice you give the member. If they do not take the advice, then put the advice in writing and keep a copy. Some standard letters are attached which may assist.

Keep evidence of each key stage; e.g. if submitting a grievance letter or appeal, evidence it with a fax transmission report/ recorded delivery receipt/ e-mail sent and delivery receipt.

The ACAS Code also recommends that employees and employers should keep written evidence of:

- the complaint against the employee
- the employee's defence/statement of grievance
- findings of the hearing, and action taken
- whether an appeal was lodged, and if so, the evidence and outcome of the appeal
- any grievances raised in a disciplinary procedure
- reasons for action taken
- subsequent developments

### **What should I generally advise members to do to comply with the Dismissal and Disciplinary Procedures?**

As far as possible, you must ensure that the members comply with the Dismissal and Disciplinary Procedures by:-

- a) Turning up for meetings when invited;
- b) Appealing against any unfavourable decision reached, even if neither you nor the member believe that the employer will change their mind.

Because the penalties for not fully following the Dismissal and Disciplinary Procedures are so severe (as stated above, if the employee fails to comply, their compensation may be reduced by as much as 50%), you should assume that the Dismissal and Disciplinary Procedures will apply to all situations where the employer has taken or is contemplating taking disciplinary action or dismissing a member. **You should therefore advise the member to comply with their obligations under the Dismissal and Disciplinary Procedures (i.e. to attend any meetings**

**to which they are invited, and appeal against any unfavourable decisions) as far as possible.**

If the employer uses the modified Dismissal and Disciplinary Procedure in a situation where they should have used the standard Dismissal and Disciplinary Procedure, a dismissal will probably be automatically unfair as the employer will not have complied with the steps it is required to have complied with under the standard Dismissal and Disciplinary Procedure. Given that there are limited circumstances in which the modified Dismissal and Disciplinary Procedures apply, you must therefore ensure that you tell your full time official about **any** situation where the modified Dismissal and Disciplinary Procedure has been used.

What if I believe that the Dismissal and Disciplinary Procedures apply in a particular situation, but the employer believes that they do not, or refuses to apply them?

You should seek advice from your full time official. You should also make it clear to the employer in writing (**see sample letter 1**) that the member is willing to attend a disciplinary meeting to discuss the matter and should ask them to confirm in writing their belief that the Dismissal and Disciplinary Procedures do not apply. You should ensure that the member appeals against any unfavourable decision reached, unless they are sure that they accept the decision and will not wish to complain about it in any form of Employment Tribunal claim later. You should also take these steps even if you agree with the employer's view that the Dismissal and Disciplinary Procedures do not apply in a particular situation if you think that the action might be relevant to any possible later Employment Tribunal claim.

What should I do if the member will not attend a disciplinary or appeal meeting or refuses to appeal against a disciplinary decision/dismissal?

You should advise the member the member that their compensation may be halved if they do not attend a meeting/appeal. You should also confirm this to them in writing using **sample letter 2**.

There is an exception under the Dismissal and Disciplinary Procedures that states that an employee will not need to comply with the Dismissal and Disciplinary Procedures if they reasonably believe there will be a threat to themselves or their property or to any other person or their property or where they have been subjected to harassment and reasonably believe that following the Dismissal and Disciplinary Procedures would cause them to suffer further harassment. However, you should not advise a member to refuse to attend a meeting in reliance upon these provisions in case a Tribunal subsequently finds that it was not reasonable to rely upon them. If you strongly believe that in a particular situation, a member would be subjected to threats or harassment if they follow the Dismissal and Disciplinary Procedures, then you should seek advice from your full time official. You should also explain to the member that if a Tribunal does not accept that they reasonably believed that they would be subjected to threats or harassment if they followed the Dismissal and Disciplinary Procedures, then their compensation may be significantly reduced.

What should I do if a member is unable to fully follow the Dismissal and Disciplinary because, for example, they are in hospital?

There is an exception under the Regulations which allows parties not to apply the Dismissal and Disciplinary Procedures in a situation where they would otherwise have to apply them if a Tribunal believes that it was not practicable for a party to follow the Dismissal and Disciplinary Procedures within a reasonable period of time. A member being hospitalised for a long period of time immediately after their dismissal might well fall within this exception. However, you should seek advice from your full time official in the first instance before relying upon this exception.

What should I do if the employer does not fully follow the Dismissal and Disciplinary Procedures?

You should advise the member to comply with his/her obligations under the Dismissal and Disciplinary Procedures as far as possible anyway. You should also keep a note of any breaches of the Dismissal and Disciplinary Procedures that you believe the employer has made and tell your full time official about these when you refer the paperwork to him/her. It may be possible to later bring these to the Tribunal's attention which may increase the member's compensation and result in a finding of automatic unfair dismissal. It may help any subsequent Employment Tribunal claim if you can show that you attempted to bring the breach to the employer's attention. **Sample letter 9** may assist in this. If the company has a procedure which is better than the statutory one, but they fail to follow it, then write them a letter based on **sample letter 10**.

What should I do if a member seeks advice from me after having breached their obligations under the Dismissal and Disciplinary Procedures?

If possible, you should advise the member to speak to the employer and see if the employer will enable them to comply with the procedures at that stage by, for example, rescheduling a disciplinary meeting or allowing the member to appeal against any unfavourable decision. If the employer refuses to allow the member to do so, then the member should be advised that any compensation that they receive may be reduced as a result of their non-compliance with the procedures. However, you should remember that a member can still bring a successful claim even if they have not fully followed the Dismissal and Disciplinary Procedures. The only effect of not following the Dismissal and Disciplinary Procedures will be on the amount of the compensation that they receive.

What should I do if a member seeks advice from me about a dismissal matter after the time limit for submitting a Tribunal claim has expired?

You should **refer the matter to your full time official immediately** as there are certain situations under the new Regulations where the time for submitting an ET1 may be extended. Generally, where an employee reasonably believes on the normal limitation date that a disciplinary procedure is still ongoing, the time limits for submitting a claim may be automatically extended by three months. However, you should not rely on this unless a time limit has already expired by the time a member

first approaches you for advice - in which case, you should speak to your full time official immediately, as detailed above.

### What should I generally advise members to do to comply with the Grievance Procedures?

As far as possible, you must ensure that members comply with the Grievance Procedures by:-

- a) sending a statement of grievance to the employer and providing details of the grievance. It is very important that they provide a very full statement of all the facts that they are complaining about and might wish to raise in any later Employment Tribunal claim. If possible you should discuss the grievance with the member and run through the attached **check list** to ensure that they include all relevant matters in their grievance letter. An outline for the grievance letter is also attached as **sample letter 11**. In order to “send” a statement, members must send a copy by post or e-mail or fax to their employer and, if at all possible, they should also hand deliver a copy to their employer. They must keep proof of postage or a copy of their e-mail, or a fax confirmation sheet. You should ensure that members send their employers the statements of grievance as soon as possible after the incident about which they are complaining and, wherever possible, within 4 weeks of that incident. This is because the statement of grievance needs to be submitted, wherever possible, in sufficient time so that the member can wait 28 days after the grievance has been submitted before lodging an ET1, but still lodge an ET1 within the normal time limit. Although there are ways of extending time limits which are detailed later, you should not rely upon these as far as possible. If there are any difficulties in drafting the statement, speak to your full time official immediately. As soon as the statement of grievance has been sent, you should refer the matter to your full time official;
- b) attend grievance and appeal meetings when invited to do so; and
- c) appeal against any unfavourable decision reached, even if neither you nor the member believes that the employer will change their mind. As with the Dismissal and Disciplinary Procedures, although the Regulations suggest that the employee can choose whether to appeal, compensation at an Employment Tribunal may be reduced if they do not.

Because the penalties on an employee for not starting/completing the Grievance Procedures are so severe (as stated above, the employee will be stopped pursuing most types of Tribunal complaints at all if they have not first submitted a written statement of grievance, and their compensation will be reduced if they fail to complete the Grievance Procedures thereafter), you should assume that the Grievance Procedures will apply to all situations where the member has a complaint of detrimental treatment. In particular, you should ensure that you advise members to submit statements of grievance in a situation where it may not be immediately apparent that a grievance will be needed, e.g. where a member is complaining about the fact that they have not received several days of holiday pay. You should also be sure to advise members to submit statements of grievance in a situation where they

have been dismissed but are owed, for example, outstanding salary or holiday pay or a redundancy payment. If any individuals fail to submit a statement of grievance in such a situation, then although they would still be entitled to bring an unfair dismissal claim against the employer, they may be stopped from pursuing a claim in respect of any outstanding holiday pay, salary, redundancy payment etc.

If you are in doubt as to whether the Grievance Procedures apply to a particular situation, then you should generally advise the member to submit a statement of grievance in any event. If you believe that there may be a good reason why a grievance letter should not be submitted, you should speak to your full time official immediately. If you are dealing with a number of members who need to submit statements of grievance about the same issue (e.g. a group of individuals who are owed redundancy payments), you should seek assistance from your full time official. In such a situation, statements of grievance must be submitted by each individual, and it may also be appropriate to submit a collective grievance for all individuals – but you should speak to your full time official about this.

What if I believe that the Grievance Procedures apply in a particular situation, but the employer believes that they do not?

You should ensure that the member sends the employer a written statement of grievance in any event. You should then write to the employer (see **sample letter 3**) and ask them to confirm their belief that the Grievance Procedures do not apply in writing. This letter should tell the employer that the member is willing to comply with the Grievance Procedures and to attend any meeting that the employer arranges. You should also seek advice from your full time official. Even if you believe that the Grievance Procedures do not apply in a particular situation, you should follow these steps.

What should I do if the member refuses to submit a statement of grievance or to attend a grievance/appeal meeting or to submit an appeal against the employer's decision in relation to a grievance?

You should in the first instance seek advice from your full time official to check that the Grievance Procedures do apply. If they do, you should then advise the member that they may be stopped from pursuing any subsequent Tribunal claim if they fail to send a statement of grievance, and that their compensation could be potentially halved if they do not attend a meeting/appeal against the employer's decision. You should also confirm this to the member in writing using **sample letter 4**.

The Grievance Procedures do not apply where a party believes their or somebody else's person or property is under threat or where they reasonably believe that they will be harassed if they follow the Grievance Procedures. However, you should not rely on this. As with the Dismissal and Disciplinary Procedure, you should explain to the member that if a Tribunal does not accept that the member reasonably believed that they would be subjected to threats or harassment if they followed the Grievance Procedures, then they may not be able to pursue their Tribunal complaint at all, or, if they are allowed to pursue their complaint, their compensation may be significantly reduced. Where a member's employment has ended and the standard Grievance Procedure was not completed, if the member refuses to, for example, attend a

meeting with the employer, then you should try and get the employer to agree to use the modified Grievance Procedure once the member has submitted their statement of grievance which will enable the whole process to be completed on paper (see [sample letter 5](#)). If the employer refuses to agree to use the modified Grievance Procedure, or if the modified Grievance Procedure does not apply or would not assist (e.g. where the member refuses to send a statement of grievance), then you should seek advice from your full time official.

What should I do if a member is unable to comply with the Grievance Procedures because, for example, they are in hospital?

The position is similar to that outlined on p.8 re Dismissal and Disciplinary procedures. The greatest risk of non-compliance is if there is a failure to submit any Statement of Grievance, so please do everything possible to ensure that a full letter is submitted to the company as soon as possible, and within 3 months of any incident at the very latest, or speak with your officer if for some reason this is not possible. It may be appropriate to use [sample letter 4](#), or an adaptation of it, to have a record that the member is fully aware of the risk of non-compliance.

What should I do if the employer does not fully follow the Grievance or Appeal Procedures?

You should advise the member to comply with his/her obligations under the Grievance Procedures as far as possible anyway, by sending their statement of grievance to the employer, attending any meetings that the employer arranges, and appealing against any unfavourable decisions. If the employer fails to invite the member to a grievance/appeal meeting, you should also write to the employer and advise that the member is willing to attend any meetings that the employer invites him/her to in accordance with the Grievance Procedures (see [sample letter 6](#)). As with the Dismissal and Disciplinary Procedures, you should also keep a note of any breaches of the Grievance Procedures that you believe the employer has made and tell your full time official about these when you refer the paperwork to him/her.

What should I do if a member seeks advice from me after the time limit for submitting a Tribunal claim has expired?

You should refer the matter to your full time official immediately as there are certain situations under the new Regulations where the time for submitting an ET1 to a Tribunal may be extended. Generally, where an employee has submitted a written statement of grievance to the employer on or before the normal limitation date, the time limits for submitting an ET1 to the Tribunal is automatically extended by three months. If an employee has not submitted a statement of grievance to their employer but submits an ET1 to the Tribunal within the normal time limit, then they have an additional month after the normal time limit expires to send the employer their statement of grievance. As with the Dismissal and Disciplinary Procedures, these extensions of time should not be relied upon unless a time limit has already expired by the time a member first approaches you for advice - in which case, you should speak to your full time official immediately.

What if a member seeks advice from me just before the time limit expires?

You should check whether or not they have sent a statement of grievance, and, if they have not done so, you should ensure that they do so immediately so that the employer receives a copy on or before the time limit expires. You should then refer the matter to your full time official immediately.

### **General advice applying to both Dismissal and Disciplinary Procedures and the Grievance Procedures**

#### What should I do if the employer arranges a disciplinary, grievance or appeal meeting at an unreasonable time, or at an unreasonable location?

You should write to the employer and try to rearrange the meeting explaining what the difficulty with the suggested time or location is (see **sample letter 7**, but delete paragraphs which do not apply). If the employer refuses to reschedule the meeting to a more convenient time or place, the member should be told to attend the meeting as far as possible and the possible consequences of not doing so should be explained to the member. If the member cannot attend the meeting, you should seek further advice from your full time official before the meeting.

#### How does the right to be accompanied fit in with these new procedures?

The right to be accompanied at a disciplinary or grievance hearing still applies in its usual way. If, therefore, a meeting is set up at a time when you are unable to attend, you should try and rearrange the meeting in the usual way. If the employer will not rearrange the meeting, however, you should attempt to get another representative to attend with the member if at all possible. If this is not immediately possible lodge a written objection with the employer using the appropriate paragraphs from **sample letter 7**. Your full time official should be told of the employer's refusal to rearrange when the matter is referred to him/her.

#### What should I do if the company's disciplinary/grievance procedures are more detailed than the Dismissal and Disciplinary Procedures/Grievance Procedures?

You should try and ensure that the employer follows its procedures as far as possible and should resist any attempt by the employer to reduce their procedures to the same level of detail as the Dismissal and Disciplinary Procedures/Grievance Procedures.

#### What should I do to ensure that the member can properly explain their case and dealing with the evidence at a meeting?

You should speak to the member to see whether they have any physical or other difficulties (e.g. problems with reading or any disability) which might effect their ability to be attend the hearing/ read any statements/ hear any questions or evidence, etc.. Examples of a situation where a member might have difficulties explaining their case would be where the member has reading difficulties, or difficulties in speaking or understanding English, or a disability that prevents them from being able to understand the allegations against them or explain their case. Even if the member

does not usually need help with the difficulty at work, the employer will have special duties to help overcome the difficulties in any hearing, e.g. by providing an interpreter/ special access arrangements/ materials in a different format, etc..

You should seek the member's consent to speak to the employer about the difficulty and should write to the employer (see **sample letter 8**) to ask him or her to make various changes that would assist. You should do this in good time before the meeting so that the employer has enough time to make arrangements to assist the member. If the employer refuses to make any necessary arrangements, the member should still attend the meeting but you should make a note of the employer's failure to co-operate and advise your full time official of this when the matter is referred to him or her.

**If you are unsure about any of the above issues, please contact your full time official.**