Disciplinary problems and grievances

A guide to best practice

AMiE is the leadership section of

ATL

the education union
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Foreword

This guide was first published in 2004 by the Association for College Management (ACM) in response to the many ACM members who were the subject of badly handled disciplinary action or unnecessary grievances.

The original publication has now been fully updated following ACM’s transfer of engagements to the Association of Teachers and Lecturers (ATL) to establish a distinct new leadership section, AMiE.

Despite the existence of some good disciplinary and grievance procedures, the actual practice can be remarkably poor. Sometimes this is down to inexperience, but at worst, there is a deliberate attempt to manipulate the outcome.

As leaders and managers, our members can be thrown in to deal with disciplinary issues or grievances without proper support and training. As employees, our members become the victims of poor decisions. The result is unfair treatment.

We hope that this guide, which is written with leaders, managers and union representatives in mind, will help to address some of the poor practice that we have uncovered. Above all, we hope that it makes a useful contribution to better employee relations and that you find it helpful.
Better employment relations

1.1 Introduction

Effective communications, good recruitment procedures and appropriate training are essential in any workplace. Together they are a foundation for better employment relations.

It follows then that managers and leaders, by their very roles, have a key job in preventing workplace problems from occurring. But even in the best organisations, conflicts, complaints and other problems can occur. So developing good procedures and best practice is essential to deal with grievances and disciplinary problems.

This guide is designed to help members and union representatives to review their current procedures and strive towards best practice. The guide looks at procedures, investigations, formal hearings and the outcomes of both disciplinary problems and grievances. There is also a short section (Section 7) on the law, to help you understand the legal context of dealing with disciplinary and grievance problems at work.

1.2 A preventative culture

There are many books, courses and theories available on managing effectively. Certainly individual management qualifications can be very helpful. But a well-functioning workplace needs more. To avoid conflict, complaints and misunderstandings requires an organisational approach. Indeed, a culture of good employment practice is the desirable goal.

Good communications are essential. This means not just directing and briefing staff, but variously consulting, negotiating with and empowering staff.

One helpful approach towards building a preventative culture is to make the Health and Safety Executive’s ‘management standards’ work. Aimed at reducing work-related stress, the management standards can, if properly implemented and monitored, help to reduce workplace problems. The six management standards seek the following outcomes.

Employees:

● are able to cope with the demands placed on them
● have a say in how their work is organised
● receive adequate information and support from colleagues and managers
● are not subjected to unacceptable behaviour, such as bullying
● understand their role and responsibilities
● are properly consulted and engaged at times of organisational change.

Clearly, implementing these management standards is not an end in itself. A preventative culture is also more likely when there is proper training, good recruitment, a safe and healthy environment and, of course, decent pay and conditions.

Good leaders and managers will motivate and value their staff, recognise achievement and build trust. As a result, they can expect fewer problems. But even in the best workplaces, problems can occur.
2 Procedures

2.1 What is a procedure?

Put simply, a procedure consists of the steps that should be followed to deal with a grievance or disciplinary problem.

You may have been given a set of procedures when you started in your role, for example in a staff handbook. Or you may be able to access them, for example from your institution’s intranet, the human resources department or even your own line manager. Every written contract of employment or every set of written terms and conditions should make reference to both the grievance procedure and the disciplinary procedure.

2.2 What makes a good procedure?

One of your first actions, when faced with a disciplinary problem or grievance, will be to consult the relevant procedure. This will set out clearly the steps that you must now follow to take the matter through to its conclusion. At least that is the aim...

Sadly, many procedures are not entirely fit for purpose, perhaps because they are too vague, too cumbersome or do not meet acceptable standards of fairness. As a minimum, a good procedure will:

- be in writing
- say to whom they apply
- be non-discriminatory
- allow for matters to be dealt with without undue delay
- allow for information to be kept confidential
- tell employees what action/steps might be taken
- say what levels of management have the authority to take decisions
- require employees to be informed of all the complaints against them and supporting evidence, before a hearing takes place
- give employees a chance to have their say before management reaches a decision
- provide employees with the right to be accompanied at every stage of the procedure
- require management to investigate fully before any decision is taken
- ensure that employees are given an explanation for any sanction or outcome
- allow employees to appeal against a decision.

A disciplinary procedure should also provide that no employee is dismissed for a first offence except in cases of gross misconduct. It also helps if the procedure gives examples of what would be considered as gross misconduct.
2.3 The importance of procedures

Proper procedures are an important step towards best practice. They enable employers to:

- deal with problems before they get out of hand
- provide a consistent method of dealing with problems.

But a procedure is meaningless if it is not followed. Whether a procedure is started by an aggrieved member of staff or by a manager considering disciplinary action, everyone involved must understand and follow the rules laid down in order to seek a resolution of the problem. But following the procedure requires something more. The aggrieved, or the individual accused of misconduct, has a right to expect consistency and natural justice. So the process itself must ensure fair play.

2.4 Using procedures

It is better to prevent grievances or disciplinary problems arising in the first place. But that does not necessarily mean that your procedures are a last resort. Their purpose is to help you and those involved to resolve a problem.

However, avoiding the use of procedures in the hope of a simpler life is not good practice either. Ignoring grievances, putting up with problems or failing to take appropriate action will only lead to resentment and bigger problems in the future. The key is to use procedures where appropriate – and to use them effectively.

We look in more detail at how to use procedures in the following sections of this guide.

2.5 Conflicting issues and counter-allegations

Disciplinary and grievance problems are not always as straightforward as they may seem. This is particularly so when they involve two or more parties, or if counter-allegations arise during the investigation or hearing.

Where this happens, it can be easy to forget the agreed procedures. But trying to tackle matters by compromising on procedure, or hearing both issues simultaneously, can be dangerous. Delays can occur, confusion can set in and resentment can build.

The sensible approach is to deal with one issue at a time. Choosing which one to take first depends very much on what the counter-allegations involve. For example, if a grievance is raised about how the procedure is being conducted, then consideration should be given to halting proceedings in order to deal with the grievance first. Also, where counter-allegations are raised and there is a chance that one case might affect any decision in the other, then it may be sensible to either delay a final decision until both matters have been investigated, or give an interim decision, providing full explanations to the parties involved.
3 Disciplinary problems

3.1 Establishing standards and rules

The required standards of behaviour and conduct for your workplace may seem obvious, but human nature being what it is, it is unwise to assume that we all have the same common sense. That is why your institution should make clear just what is – and what is not – acceptable and expected.

Many organisations set out guidelines or rules in their staff handbook or employment policies, including the disciplinary procedure itself. For example, there may be rules covering private use of the Internet, rules on alcohol, rules on time-keeping, a policy on harassment and bullying, etc. However, the institution should only devise rules that are necessary for safe performance, and for maintaining standards of behaviour and relationships.

It is good practice if rules or guidelines are drawn up in agreement with trade union representatives.

Difficulties can arise when issues are not clearly a direct result of misconduct or where blame is not easily attributable. Take poor performance, for example. Is this a matter for disciplinary action or is there a more appropriate way to deal with the matter, such as appropriate training? In some institutions there are separate procedures to deal with capability issues, and disciplinary action is only considered if the employee refuses to comply with any steps to tackle the performance problem. This is certainly AMiE’s preferred option, and we encourage employers to negotiate separate capability procedures with unions, to deal with performance issues.

Similarly, what about someone who is regularly absent because of a health issue, or someone who is charged with an offence for something unrelated to the school or college? These issues are considered in Sections 3.14 and 3.15 respectively. The point to note is that managers and staff need to know what standards and rules apply, and what procedure will be used to deal with any shortcomings.

3.2 Minor misconduct

Your procedure is there to help, but will not be needed for every incidence of misconduct. Minor misconduct is perhaps best dealt with informally; and a quiet word may be all that is required. Indeed, if a usually reliable and valued member of your team suddenly does something out of character, a quiet word may reveal mitigating circumstances for his or her behaviour. You need to exercise judgement, remembering that you must remain fair and objective.

Daily contact with your team members will highlight potential problems, enabling you to take preventative action. However, if you do take someone aside for a quiet word, make sure that you keep it friendly, remembering to smile, asking open questions and giving encouragement where appropriate.

The informal approach is all about agreeing with the individual a way to effect an improvement in their conduct or behaviour. You should be wary of slipping into a more formal approach, as you may find unintentionally that you are in breach of your disciplinary procedure. If the matter is sufficiently serious, or if bigger issues are uncovered, any meeting with the individual should be adjourned and the matter dealt with more formally.
3.3 The formal process

If the issue is more serious, or if informal action has failed to bring about a change for the better, then a formal approach will be appropriate. This means using the steps in your procedure to investigate the matter properly, make recommendations on whether a disciplinary sanction might be appropriate, and then, if necessary, hold a hearing to consider all the evidence.

This is not a one-person job. Your procedure should say who is involved and at what stage; and the individual concerned will have a right to union representation.

3.4 Investigating a disciplinary matter

No disciplinary action should ever be considered without an investigation. A proper investigation is the key to the whole disciplinary process. As such, the investigator needs to get things right. We recommend that those responsible are properly trained, and have access to publications such as this one. To find out more about best practice in investigations, please see Section 5.

Investigations should only take place if there are genuine grounds for concern about conduct. Sadly, we have come across cases where an investigation is used as a ‘fishing trip’, perhaps going back many months or years to try to find something to hang on the individual. Another bad practice is looking back to previous incidents of misconduct that were ignored at the time. Clearly, if it did not warrant an investigation at the time, it can hardly warrant one now.

3.5 Suspension

Most procedures provide for an employee to be suspended on full pay while any investigation against them is underway. Despite what might be said to the individual concerned, this is a serious step.

Employers should think very carefully before deciding to suspend an individual and should always consider the impact. The often visible removal of an individual from the premises will lead to speculation and rumour. There is also a big impact on trust and confidence. It undermines the individual in front of colleagues, and it can undermine morale. Add in the forced isolation and the probable anxiety, and you have a recipe for ill health. In addition, returning to work from any prolonged period of absence presents its own problems; and the longer a person remains on suspension, the more difficult it will be to pick up where they left off.

The serious impact of suspension has been recognised by the courts. Awarding an injunction to force the lifting of a suspension, a Court of Appeal judge said: ‘Suspension changes the status quo from work to no work, and inevitably it casts a shadow over the employee’s competence. Of course this does not mean it cannot be done but it is not a neutral act’ (Mezey v South West London and St. George’s Mental Health NHS Trust 2007 EWCA Civ 106).
More evidence that suspension should only be used after very careful consideration is found in the government’s statutory guidance to schools and colleges on dealing with allegations against staff accused of abusing children (see also Section 3.13). The guidance states that suspension must not be an automatic response to the allegation; and that consideration should be given to alternatives. It says suspension should only be considered if there is a ‘risk of significant harm’ to a child or the allegations warrant investigation by the police.

Given all of the above, we recommend that suspension should only be used where there appears to be a genuine risk to property or other people; or where there are genuine concerns about interference in any investigation. When suspending someone for these reasons, an employer should:

- ensure that it is for the shortest possible period and state when it should end
- provide the individual with written reasons as to why they are being suspended
- ensure that the individual remains on full pay throughout the suspension
- not prevent the individual from reasonable access to people or documents (so they can prepare a defence against the allegations they are facing)
- explain they can appeal against their continued suspension, should it last longer than expected. Such appeals should only be concerned with the reasonableness of the suspension, and should not stray into the facts of the disciplinary matter itself.

3.6 Disciplinary hearings (or meetings)

If, arising from the investigation, the evidence indicates that there is a sufficiently serious problem, then a disciplinary hearing (or meeting) should be convened. The purpose of the hearing is to determine, based on the evidence and information presented, whether disciplinary action should be taken against the individual.

We look at how to hold a hearing in Section 6.

3.7 Outcomes: informal action

On hearing the evidence, it is possible that although a change in behaviour is needed, a disciplinary sanction might be disproportionate or even unwarranted. For example, there may be mitigating circumstances that if removed or eased, should solve the problem. In such cases, the desired result would be better achieved through informal action.

Through discussion and encouragement with the individual concerned, agree a plan to improve conduct and performance within a particular timescale. Additional training, supervision or mentoring may be appropriate, with the emphasis being on a positive outcome.

Try to take account of any circumstance that has led the individual to the present situation, and ask how you can help to bring about the required changes. Listen carefully in your one-to-one discussions, and try to be constructive when discussing any shortcomings. You are more likely to succeed, if the individual has some ownership of the improvement process.
Although this is not disciplinary action, it may be necessary to remind the individual that any return to old ways might result in a disciplinary sanction. Review progress with the individual on a regular basis and keep concise notes for the record.

### 3.8 Outcomes: disciplinary sanctions

Each case will depend on its merits, but if after the hearing it is decided to impose a disciplinary sanction, there are some important points to consider.

If the panel does not consider there to have been a breach of discipline, then the parties should be told so at the earliest opportunity, with the decision backed up in writing to the individual and his or her representative.

If, on the evidence available, the panel believes that disciplinary action is necessary, then they should note:

- whether the disciplinary procedure itself indicates what the likely penalty should be (many procedures do)
- what sort of penalty has been given for similar cases in the past
- whether there are (or were) any mitigating circumstances, including health or domestic issues
- whether there is any outstanding disciplinary action in force against the individual.

The aim is to decide what penalty would be reasonable in the circumstances. Depending on the school or college disciplinary procedure, this would usually be one of the following:

- **a formal verbal warning**: for minor misconduct
- **a first written warning**: for more serious misconduct, or a repeat of previous misconduct (or a failure to improve)
- **a final written warning**: for serious misconduct or further misconduct while a first written warning is in place
- **dismissal**: for gross misconduct (see Section 3.9 below) or further misconduct while a final warning is in force. Dismissal is always a last resort, and it may be desirable to consider extending the length of a final warning if the continued misconduct is not as serious as before.

Each of the above should have time limits on how long they remain on the individual’s record. For example, a formal verbal warning would usually expire after three months if there was no repeat incident. Similarly, first and final warnings might expire after six and 12 months respectively. Other penalties may be applicable, such as a period of suspension without pay, but only if they are provided for in the employee’s contract of employment.

If dismissal is required, then – unless it is for gross misconduct – proper notice (or pay in lieu of notice) should be given according to the individual’s contract of employment. Clearly, when an individual is dismissed, it is most important to have followed good practice throughout the process. By doing so, the institution will significantly reduce the chances of a successful unfair dismissal claim against it.
Once a decision to take disciplinary action has been reached, the employee should be informed as soon as possible. Although this can be done face to face, it should always be backed up in writing for all but a verbal warning, stating the reasons for the decision, the action to be taken, and the length of time the penalty will remain in force. The warning should also state what improvements in conduct are expected, how this will be assessed and over what time period. Finally, the letter should advise the individual of his or her right to appeal and how this should be done.

Any disciplinary action taken should remain confidential. A copy of the warning should be kept by your institution’s human resources department, with copies being sent only to those who need to know, such as the individual’s union representative and line manager.

3.9 Gross misconduct

Gross misconduct, resulting in dismissal without notice, should only occur when the contractual relationship between the individual and the employer has been completely destroyed. As such, it should be reserved for only the most serious offences, such as physical violence, theft or fraud. Poor performance is unlikely ever to amount to gross misconduct, unless it involves serious negligence.

Most school or college disciplinary procedures list examples of behaviour that would be counted as gross misconduct.

3.10 Appeals

Your institution’s disciplinary procedure should include an opportunity for the individual to appeal against the decision. Possible grounds for an appeal might be that:

- the evidence at the hearing was flawed
- new evidence has emerged
- the penalty was not consistent with that of similar cases
- the penalty was unreasonable/too severe
- the disciplinary procedure itself was not applied fairly.

It must be stressed that an appeal is not a re-hearing; and ideally, this should be explained in the procedure and to the individual making the appeal.

Your procedure should also provide for a different panel or individual to hear the appeal, preferably with a more senior management role. Some procedures set out clear steps to be taken for an appeal to be lodged and then heard.

Appeals should be dealt with swiftly and fairly. The individual, usually through their representative, should be given the opportunity to state the grounds for the appeal, and to present any supporting evidence. The panel may wish to ask questions before adjourning to consider their decision.

If the panel accepts the grounds for the appeal, then they should not be afraid to alter or reverse the original decision. However, it is accepted good practice that an appeal outcome should never increase the original penalty.
3.11 Senior post-holders

Special procedures exist for disciplinary hearings and action concerning designated senior post-holders in FE and sixth form colleges. These should be referred to in the college corporation’s articles and instruments (although they may also have been written into the college procedures).

Although they may differ to the main procedure in terms of who does what, for example, the overall approach should be the same as for disciplinary issues involving other staff.

3.12 Trade union officials

When disciplinary action is considered against a trade union representative, it is good practice to discuss the matter beforehand with a senior union representative or full-time official. Indeed, most disciplinary procedures explicitly include such a provision. The purpose is to avoid any misunderstanding that the representative is being singled out because of his or her union activities.

3.13 Allegations of abuse against children

The Department for Education (DfE) has published statutory guidance\(^1\) on dealing with allegations that staff have abused children at their institution. This guidance applies to all types of school, to FE colleges, governing bodies and local authorities.

The guidance should be used in respect of all cases in which it is alleged that a member of staff has:

- behaved in a way that has harmed a child, or may have harmed a child
- possibly committed a criminal offence against or related to a child
- behaved towards a child or children in a way that indicates he or she would pose a risk of harm if they work regularly or closely with children.

The guidance makes clear that all schools and colleges should have procedures for dealing with such allegations. However, the guidance says that common sense and judgement should be applied. It states that many cases may not meet the criteria above; or that if they do, the allegations may not warrant consideration of a police investigation or enquiries by local authority children’s services. A decision on the latter will be made with the help of the local authority designated officer (LADO). As such, any allegations that appear to meet the criteria must be reported to the LADO at the earliest opportunity.

As this is statutory guidance, your school or college should already be compliant. A copy of the guidance can be downloaded from the DfE’s website (www.education.gov.uk).

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\(^1\) Dealing with Allegations of Abuse Against Teachers and Other Staff: Guidance for Local Authorities, Head Teachers, School Staff, Governing Bodies and Proprietors of Independent Schools (DfE, August 2011)
3.14 Sickness absence

Some employers may start formal disciplinary procedures against someone with a poor sickness record. In such cases, unless there is an improvement in the individual's health, the expected outcome is usually dismissal.

We do not accept that genuine sickness is a disciplinary matter. In a school or college there should be other human resources procedures or practices for dealing with sickness absence. Moving to dismiss because of poor attendance is something that must only be considered after a proper assessment of the medical advice – and then only as an absolute last resort. Indeed, any hasty reaction could result in the subsequent dismissal being unfair.

3.15 Civil and criminal offences outside work

The Advisory, Conciliation and Arbitration Service (ACAS) advises that an employee should not be disciplined or dismissed solely because he or she has been charged with, or convicted of, an offence that is unrelated to their work. In such cases, the employer must consider whether or not there are genuine implications for the workplace. Where it is thought there could be implications, and therefore disciplinary action might be warranted, then a proper investigation should be carried out.

A frequent allegation in such cases is that the individual has brought the school or college into disrepute. Factors that will need to be considered include:

- the seriousness and nature of the offence
- the likelihood of adverse publicity
- the impact on staff and students
- the impact on the institution’s business interests
- the seniority of the individual concerned.
Grievances

4.1 Introduction

Few workplaces are entirely problem-free, and managers need to give attention to such matters as they arise. Indeed, left to fester, a grievance that might start out as fairly minor could lead to long-term trouble. It is important, therefore, to have a route by which an individual can raise issues of concern with a view to resolving the problem.

4.2 Grievance procedures

Many minor workplace problems are sorted out informally. An individual raises the matter with his or her line manager, who then acts accordingly. But where the matter is more serious or difficult to deal with, the individual may feel that the issue has not been properly addressed. Also, a manager may see the grievance as some kind of criticism and may immediately take a defensive approach.

At this point, an individual has the option of putting his or her grievance into the formal procedure. Most formal procedures cannot be invoked until the matter has been raised informally first.

A typical grievance procedure would then follow a series of stages in order to try to resolve the problem.

- Typically, the first formal stage will be a hearing at which the individual, his or her representative and the immediate line manager try to reach an acceptable solution. If nothing can be agreed, then the next stage of the procedure can be brought into play.
- The matter will then be heard by a more senior manager, perhaps including a more senior union representative.
- If applicable, the procedure continues through a series of stages, until either the matter is resolved or the procedure is exhausted.

Even when a procedure is exhausted, there is always the option to use – if the parties are agreed – an internal or external mediator, conciliator or arbitrator, such as the service provided by ACAS.

4.3 Registering a grievance

To register a formal grievance, most procedures require the individual to set out their concerns in writing, often with a mention of the outcome they are seeking. Even if the procedure does not require written grievances, it is advisable to type something up so that a clear record can be kept. Indeed, if there is any likelihood that the grievance may form grounds for a complaint at an employment tribunal, it is generally advisable for the grievance to be submitted in writing.
Some institutions require use of a specific form or template in order to submit the grievance. A typical template might ask the complainant to set out:

- the nature of the problem
- a brief summary of the evidence that they have
- the outcome that they are seeking.

### 4.4 Investigating a grievance

Before a formal meeting or hearing can be held to consider the grievance, an investigation into the complaint is usually needed. Depending on what the procedure says, this is sometimes carried out by the manager who will actually consider and decide on the grievance. However, in serious matters like bullying or harassment, the investigator should be someone unconnected to the issue.

The purpose of the investigation is to collect the facts and to decide, based on the available evidence, whether or not the grievance is justified, or has any merit requiring further consideration. The approach will be similar to that used for a disciplinary investigation, and should be carried out in the same professional manner.

To find out more about conducting investigations, please see Section 5.

### 4.5 Grievances about other individuals

Unfortunately, many grievances are about the behaviour or attitude of another individual. Such grievances need careful handling, as they may involve allegations of a quite serious nature that could result in disciplinary action. However, they could be malicious, or a reaction to an unpopular, but perfectly reasonable, management decision. Either way, it is vital that a proper investigation is carried out to uncover the facts.

### 4.6 Grievance meetings or hearings

Whatever the conclusion drawn by the investigator, the aggrieved individual should have the opportunity to discuss the findings at a formal meeting or hearing in accordance with the institution’s procedure.

Grievance hearings can differ from disciplinary hearings in two main ways.

- Unless the procedure says otherwise, there may be fewer people present. The earlier stages may involve (as well as the individual and his or her representative) only the line manager or the next most senior manager and perhaps a note-taker. Panels of managers, where they are written into a procedure, tend to be present in the later stages.

- The other main difference is in the proceedings itself. The aim is to secure an agreeable resolution, so discussion and negotiation are more likely, rather than formal presentations and cross-examinations.

Preparation for the hearing will be similar to that for a disciplinary hearing (see Section 6).
4.7 Making a decision

Careful consideration must be given to the investigation report and to the evidence presented at the hearing. But sometimes a decision can have a wider impact, particularly if involving a change in working conditions. So before any decision is taken or agreements are reached, it is wise to seek clarification of anything on which you are unsure, such as a point of law, interpretation of a policy or the financial cost of a decision. Your aim is to reach a decision that is reasonable in the circumstances.

So this may mean delaying your final response until a later date. However, any delay should be reasonable and when the decision is reached, the individual and his or her representative should be advised as soon as possible. This can be done verbally, but should always be followed up in writing. In giving the decision, an explanation should be included, together with details of any issues that have been agreed and a timescale for any action that will be taken.

Where a grievance is either dismissed or only accepted in part, or where there is (or might be) disagreement on the action arising from a decision, the individual should be advised of their right to refer the matter to the next stage of the procedure.

4.8 The next stage (appeals)

If a matter is referred to the next stage, a more senior manager (or possibly a panel of managers) should hear it in accordance with the written procedure. No further investigation is generally required, and the hearing or appeal format will be the same. Unless there is any new information or evidence, it will focus on the fact that the earlier decision was unfair or inconsistent with previous decisions.

4.9 Mediation and arbitration

Even where a procedure is exhausted and no agreement has been reached, there is still the option of using mediation.

Mediation is a common form of conflict resolution, and can be used at any stage in a procedure to try to resolve a dispute between individuals. However, to have any chance of working, the process must be understood by all concerned.

The mediator has to be impartial and independent; and the parties have to enter mediation on a voluntary basis. Mediation will help parties to focus on the issues, rather than the emotions, and will explore ways of resolving common concerns and differences. A mediator will not make judgements, provide counselling or focus on the history of a dispute.

Experience of mediation can differ widely, but it can bring benefits when done properly. As such, we advise the use of trained mediators from an organisation such as ACAS.

Another process is that of arbitration. Here a third party will consider the merits of each side’s case and decide on a suitable settlement that is binding on the parties. Again, those involved have to agree to the process beforehand and, in particular, to be bound by the outcome.
4.10 Collective grievances

From time to time, a grievance may be raised by a group of individuals or, on their behalf, by their trade union. Some grievance procedures provide for collective grievances, but in others such matters are referred to the local joint negotiating machinery or disputes procedure.

4.11 Bullying and harassment

Many institutions have developed specific policies and procedures to deal with bullying and harassment complaints. Apart from the sensitivity of such issues, there can also be a legal angle such as sex or race discrimination. As such, a separate procedure is generally considered good practice.

But whether your employer uses the grievance or a separate procedure, it must take any complaint of bullying seriously. Bullying behaviour, if allowed to thrive, can have extremely serious consequences for the victim, affecting not just their ability to work but also their health and family life.

So, while the individual making the complaint must be made aware of the serious nature of such an allegation, they must also feel confident that the matter will be investigated swiftly and thoroughly.

With any bullying allegation one has to look at patterns of behaviour. For example, bullying behaviour is generally repetitive. An isolated outburst of shouting, while nothing to be proud of, does not generally make someone a bully. To help the investigation and any subsequent hearing, consideration should be given to the correct definition of bullying and to the generally accepted examples of bullying behaviour. The existence of a robust bullying procedure would be helpful in such circumstances.

4.12 Malicious and misconceived grievances

Thankfully it doesn't happen often, but sometimes a grievance is submitted deliberately to create trouble for someone else.

A good procedure will state that deliberately malicious grievances are unacceptable, and that by submitting one, an individual is likely to face disciplinary action. That said, it may not be until completion of the investigation that a malicious grievance is uncovered.

Some care needs to be taken in distinguishing a deliberately malicious grievance (which generally will be based on flawed or fictitious evidence) from a grievance that has been badly conceived. With misconception grievances, someone may, for example, complain quite genuinely of unfair treatment or even bullying, because of a particular management decision they do not like. The problem can arise when a misconceived grievance borders on the malicious. This would be a matter not only for the investigator to consider, but also for a hearing to determine.
5 Carrying out an investigation

5.1 Before you start

Investigating an allegation of misconduct, or looking into an issue that has given rise to a grievance, is the most important part of any procedure.

The person carrying out the investigation should be independent of the manager or panel who decides the final outcome of the case. Some institutions will pay a consultant to carry out an investigation, while others will appoint a manager who has no connection to the issue or parties involved.

If you have been asked to investigate a matter, the following advice will prove helpful.

5.2 Timing

Carrying out an investigation requires care and attention, and it should take place promptly, before memories fade. This will often require the co-operation of other managers or team leaders. While you will wish to be aware of their operational needs, you must stress the importance of an early resolution to the investigation.

5.3 Notification

The person under investigation must be told what is happening and why, before the process begins. To do otherwise is not just bad practice, but it is not in keeping with the principles of a fair and transparent procedure. Sadly, some institutions show little respect for their own procedures and we have examples of investigations being conducted in secret without the knowledge of the individual.

Notifying someone that they are to be investigated is best done in person, and followed up with written confirmation. We recommend a personal approach, asking them to come to a meeting because a problem has arisen. We definitely do not condone ambushing someone with the news in a meeting called about something else.

At the meeting they should be told the nature of the allegation and what the investigation process will involve. They should then be handed written details of the complaint against them, and should also be given a copy of the disciplinary procedure. As this news may well come as quite a shock, care should be taken to remain friendly. The individual should be told that they will have an opportunity to put their side of events to the investigator; and (assuming that your procedure does not explicitly prevent it) that they have a right to be represented during the investigation process. In any event, they should be advised to speak to their union representative.
5.4 Purpose of the investigation

The purpose of the investigation is to collect all the facts: who, what, where, when and why. This will involve one or more of the following:

- taking statements from witnesses
- taking a statement from the person under investigation
- collecting and reviewing all relevant documents
- checking appropriate policies and procedures
- checking the current custom and practice
- checking whether there are any legal implications.

Remember, your role is to establish the facts – not to prove a case.

5.5 Interviews

When interviewing the person under investigation, we recommend that you invite them to be represented by a trade union representative or accompanied by a colleague. This is not only good practice, but it can also help proceedings. A good representative will recognise an unfair question (e.g. a leading question) and perhaps ask you to rephrase it; and the representative will encourage his or her member to answer honestly. A representative should not, however, answer questions for the member.

Arrange a mutually convenient time and place as soon as possible. It should be made clear at the outset that the meeting is neither a hearing nor a negotiation; but it is part of an investigation being conducted under procedure. Emphasise to all involved the confidential nature of the meeting.

Ask only questions that relate to the individual case. Your job is to uncover the facts. You will need to establish:

- the sequence of events, dates, times and places
- the parties involved
- whether there were any witnesses (you will need names, dates, times and places)
- whether there is any documentary evidence (e.g. minutes of meetings, e-mails and any attachments, letters, employment contracts, appraisal notes, reports)
- whether there are any mitigating circumstances.

You must avoid turning the interview into any kind of hearing about the individual’s behaviour; concentrate instead on asking open questions. At no point should you offer your opinion or jump to conclusions. It is also important to stay within the parameters of the allegations – ‘fishing trips’ to try to uncover anything to make the individual appear bad are unacceptable.
It is likely that you will require explanations for specific allegations or events. Prepare your main questions in advance and give the individual a copy of these at the interview. Explain the reason(s) for each question, and ask your questions clearly. Ask open questions and use silences to encourage the individual to respond. Seek clarification where the response is unclear, is ambiguous or contradicts a previous answer.

Take notes throughout the process. If a union representative is present, allow time for consultation with their member or even adjournment. The object is to find out what happened, not to catch out the individual, not to argue with them and not to cross-examine.

Once you have asked all your questions, the individual should be given the opportunity to ask any questions of their own.

Remember that the individual may feel guilty, scared, isolated, hurt or even threatened. It is vital, therefore, that you approach the interview in a professional way, remaining calm and empathetic. If necessary, take a break. Where possible, ensure that refreshments are available.

5.6 Taking a statement

Towards the end of the interview, it is good practice to read back your questions and summarise the individual’s answers. This way you can make sure that you have recorded things properly. You can then write up the replies into a statement from the individual. This can be submitted after the interview or drawn up there and then. Whichever is the case, ensure that any errors are corrected and the statement is agreed. It can then be signed and dated by the individual and by the investigator, and copies can be given to the individual and their union representative.

5.7 Witnesses

The same basic approach should be taken when interviewing witnesses and any other parties involved. Your aim is to find out what happened, what they saw or heard, etc. To put witnesses at ease, make it absolutely clear that they are in no way under investigation themselves. Again, prepare questions, check responses and draw up a statement for the witness to sign.

It is possible that a witness will only be prepared to go ‘on the record’ if anonymity is agreed. Before agreeing to this, ask why they wish to remain anonymous. You are looking for genuine and reasonable grounds as to why the witness should remain anonymous. Consider whether the witness has any reason to lie, or what the consequences might be if their statement were signed. If there is a risk of the witness being intimidated, then this is a serious matter and will warrant further investigation.

Assuming that anonymity is agreed upon, then proceed as above – but wherever possible, corroborate what you are told. If you do not believe the witness to be credible, then you should not put any emphasis on their statement and you should explain why when you report your findings.
5.8 New issues

Sometimes during an investigation bona fide new issues will be uncovered, which also raise concerns about the employee’s conduct. (But please see also Section 5.5 for comments on deliberate attempts (‘fishing trips’) to try to uncover anything to make the individual appear bad.)

If new issues are uncovered, advise the employee that these matters will also be included in the investigation, and ensure that you put these additional concerns to them at their investigation meeting. If the issues come to light after the initial investigation meeting, then a further investigation meeting with the employee should be held.

5.9 Custom and practice

Although current working practices are not always relevant, you must also be sure to understand them. Workplaces – and the way things are done – evolve with time, and current practice may be different to what is written down in some ageing handbook. The custom and practice may be quite poor, and may even be part of the problem. So try to keep an open mind as you root out the relevant facts.

5.10 Legal considerations

Finally, think about whether any legal considerations might apply. This is not just about following correct procedure. Employment law is complex, and employment contracts are particularly so. Many disciplinary actions may result from, or impact on, individual rights, so it is important to know what is at stake.

If in doubt, seek advice from your human resources department or, if you are an AMIE member, call our helpline for advice (see the Appendix for contact details).

5.11 Bad practice

We have uncovered some very poor practice when it comes to investigations. Bad practice undermines your procedures and the confidence of staff. It also reflects badly on those who instigate or conduct the investigation.

Some bad practices have already been mentioned above, but here are a few more to avoid.

- Do not use investigations as a threat (e.g. to encourage someone to resign).
- Do not miss out key witnesses or other relevant facts.
- Do not drag out investigations over many weeks or even months.
- Do not allow interference in an investigation or any other attempt to manipulate the outcome.
5.12 Reporting your findings

Once you have finished your investigation, you will need to make a report. It may seem obvious, but we have found it helpful to break down the report into different sections as follows:

- an introduction stating the purpose of the report
- an outline of the nature of the complaint
- a summary of your recommendations
- the evidence
- your findings and recommendations
- an appendix (or a list) of supporting documents.

You need to evaluate your findings. Look for any gaps, and weigh up evidence that is certain and strong. Summarise the statements that you collect, together with your notes. Also refer to any relevant documents. Where there is evidence of mitigating circumstances, then this must also be considered.

By way of making a recommendation, you should then conclude in one of the following ways.

- There is no evidence or there are no grounds to suggest that there was/is a problem, and therefore no further action should be taken (or the matter is so trivial that no action should be taken).
- The evidence suggests that there is a problem that needs correcting, but that informal action would be more appropriate at this time. For example, if the individual has acknowledged that his or her behaviour was not entirely acceptable and indicates a wish to put things right, then a recommendation for informal action (e.g. counselling) may be more appropriate than disciplinary action.
- The evidence suggests that the problem is sufficiently serious to require a formal hearing in line with agreed procedures.

In reaching your conclusion, you must do so only on what you reasonably believe to be the facts. You must be fair and consistent, and must not discriminate on grounds such as race, sex or disability.

Your report should be submitted promptly to the appropriate manager, in line with your institution’s procedure. A copy should also be given to the individual who was under investigation and to his or her trade union representative.
6 Hearings

6.1 Purpose

The purpose of a hearing is to consider the facts, making sure that the subject of the hearing has the opportunity to present his or her case.

A hearing is not a court of law, and trying to sound like a lawyer should be avoided. It is not called so that one side can make the other look stupid or to score points off each other. Nor is the purpose for management to secure a ‘guilty’ verdict or to dismiss a grievance. The facts should speak for themselves. By making them clear, it will be easier to decide if disciplinary action is needed or if the grievance has merit.

6.2 Format

The format of hearings is often set out in your college or school procedure. Usually there will be a manager to present the institution’s case and one or more managers (sometimes referred to as ‘a panel’) to hear the evidence and reach a decision. It is good practice for the panel hearing the evidence to be unconnected with the individual concerned. Also present in an advisory capacity might be a personnel officer or manager and someone to take notes of the proceedings. Finally, the individual will be present and usually his or her union representative.

This may seem very formal and cumbersome. Not surprisingly, we sometimes find in practice that the same manager will present the case and determine what action, if any, is to be taken (i.e. there is no independent panel). This is more common with grievance hearings, but it is not good practice. With disciplinary hearings, it would probably amount to a breach of the ACAS Code of Practice (see Section 7.3). In either case it could leave the individual feeling that the process was a sham, and leave the institution open to accusations of unfair treatment. If the process results in a dismissal, then any serious lapse in procedure could reflect badly at an employment tribunal.

6.3 Notice of the hearing

Written notice of the hearing should be sent to the individual in good time, enabling them to prepare their case. The letter should set out the nature of the allegation(s) and explain that the individual has a right to be accompanied. The letter should also set out the proposed date and venue for the meeting. By law, the individual can suggest an alternative date within five days of the one already proposed in order to allow his or her representative to attend. However, at this point it is good practice to arrange a mutually convenient time and date with everyone concerned, including the representative.

Any special needs, such as an interpreter, wheelchair access or an induction loop, will also need consideration.

It is good practice to enclose with the notice all relevant evidence from the investigation, for example the investigation report and any witness statements. In any event these will need to be given to the individual and/or their representative well before the hearing, to give him or her time to prepare a case (see Section 6.4).
6.4 Preparing for the hearing

Whether you are presenting the case on behalf of management, or representing the individual, it is vital to be properly prepared. This is not something that can be rushed, and will require some effort if you are to do a proper job.

Whichever side you are supporting, you will need to ensure that you have:

- details of the procedure to be followed at the hearing
- details of the grievance or allegations against the individual
- a statement from the individual
- a copy of the investigation report
- the names of any witnesses who will be called by each side
- copies of any witness statements that will be used
- any other relevant documents
- details of any disciplinary warnings currently in force against the individual
- details of how any similar cases have been resolved.

A first step is to work out your aims – what you want to achieve. In a grievance, the path to an acceptable outcome might mean some sort of compromise. So you may find it helpful to consider an ‘entry’ position (what, ideally, you would most like to achieve) and an ‘exit’ position (your bottom line).

You will need to go through all the information and evidence that you have, to put together your case. You may wish to make notes for your opening statement, drawing on the evidence that you intend to provide to the hearing. Concentrate on your strongest points and avoid anything that might undermine your position. You should also put all your documents in order, numbering each document and page so that references can easily be found during the presentation.

You will also need to prepare questions to put to the person presenting the other side’s case and to the other side’s witnesses. Study the statements and reports for contradictions, inconsistencies and lack of clarity or substance. Likewise, try to anticipate the questions you may be asked and prepare suitable responses.

To ensure fair play, witness documents and papers should be exchanged with the other side well in advance of the hearing (indeed, this may be written into the procedure). New evidence or information can still be presented at the hearing, but it is good practice to make it available to the other side in good time.

If representing the individual, you must discuss the case in detail with them. You need to be sure of all the facts – who, what, where, when and why. You also need to find out if there are any underlying problems perhaps not related to the job that might help account for what has happened, or any mitigating circumstances, such as poor supervision or a lack of training.
6.5 Conducting the hearing

The steps for conducting hearings may be set out in the grievance or disciplinary procedure itself. If not, then it is likely that the hearing will begin with opening statements from either side, followed by presentation of evidence/counter-evidence (including any witness statements) and questions. Each side may then be asked to sum up, before the panel adjourns to consider the facts and reach a decision.

If the matter concerns a grievance against another individual, the parties may find it helpful to agree in advance of the hearing whether their respective cases will be put privately or with the other side being present. In cases where a serious breakdown in the working relationship is evident, then hearing each case privately might be the only way of proceeding. If so, written questions on individual statements must be tabled in advance.

At the end of the hearing, the individual(s) should be told when they could reasonably expect to hear a decision.

6.6 Chairing the process

It is good practice to agree in advance who will chair the proceedings. This might be a member of the panel or the personnel manager. In practice, hearings do not always follow an orderly agenda, so a good chair will need to keep everyone focused.

A useful start is to explain the proceedings straight after the introductions have been made. During the hearing, care must be taken to ensure that everyone has the opportunity to put their case, and that people remain calm. Remember, the aim is to establish the facts, so that a decision can then be taken.

6.7 The role of the presenting manager

The presenting manager’s job is to make the case for management, and he or she will normally speak first. The report should be introduced, summarising the key points and accompanying evidence. After the opening remarks from both sides are complete, the presenting manager should go through the evidence in detail, referring either to the investigation report, written statements or documents, or to the witnesses. The manager will then need to respond to questions asked by the other side or by members of the panel. Later in the hearing, the presenting manager may want to put questions to the individual and his or her representative.

6.8 The roles of the individual and their representative

The roles of the individual and their representative are very similar to that of the presenting manager: putting forward an opening statement, the detailed explanation and questions. Normally the representative will present the individual’s case, with the latter perhaps responding to specific questions. However, it does not always follow this pattern and will depend on what the two have agreed beforehand.
6.9 The role of witnesses

It is better if any witnesses can be present at the hearing. Their role is to state what they saw or heard, and answer any questions that might be put to them; and they should only attend to provide their evidence. Witnesses are not under any type of investigation or suspicion, and so should be put at ease when called.

If a witness cannot attend the hearing in person, then they should be asked to provide a written statement in advance. However, there is nothing to stop the two sides agreeing that all witness evidence will take the form of written statements only.

6.10 The role of the panel

The panel members’ role is to decide, on the basis of the evidence presented, whether there has been a breach of discipline and/or whether the grievance is upheld; and what action, if any, should be taken as a result.

During the hearing, the panel members will need to listen carefully, take notes and ask for clarification of any points that are not clear. Once the hearing is over, the panel will need to adjourn to make their decision.

6.11 The role of the personnel officer

A member of the personnel or human resources department might be present at the hearing in an advisory capacity. This will be to clarify any procedures, practices or legal points that may arise during the hearing. The personnel officer may also be responsible for taking the minutes of the hearing.

6.12 The use of adjournments

If necessary, adjournments can be used to allow time for new evidence to be considered in private by each side, or for a cooling-off period if proceedings become a little heated. An adjournment may also be needed to clarify or check on something relevant to the hearing. Either side can ask for an adjournment; it is up to the chair whether to agree or not.
7. Keeping it legal

7.1 Introduction

If you follow best practice, then you can be confident that your process was not only fair but entirely lawful. That said, one should remember that employees have individual rights. As such, the issue behind a grievance, or the dismissal of an employee for misconduct, may result in a complaint to an employment tribunal.

A summary of the various individual employment rights is beyond the scope of this guide. However, below we touch briefly on a few of the legal considerations that relate directly to disciplinary and grievance issues.

7.2 The right to be accompanied at a hearing

Section 10 of the Employment Relations Act 1999 gives all workers the right to be accompanied at a disciplinary or grievance hearing. Under this important right, a worker may be accompanied by a work colleague or a trade union official. What’s more, the union does not need to be recognised by the employer, nor does the employee need to be a union member.

It is important to note that the Act deliberately uses the word 'worker' and not 'employee', thus extending the rights to agency workers and self-employed or contract workers who may work in an educational institution.

Technically, an employee must make a request to be accompanied for the law to take effect. However, the right to be accompanied is already written into most procedures covering schools and colleges.

Anyone involved with arranging meetings will understand the difficulty of arranging suitable dates. The law provides for alternative hearing dates to be arranged if the representative cannot attend on a particular day. It is the responsibility of the worker to propose the alternative date and it must fall within five days of the original date. However, in practice, attempts to meet the diary commitments of all parties mean that some flexibility is often needed.

At the hearing, the representative can address those present and can confer with the employee. In practice, this means that the representative can present and sum up the employee's case, ask questions and call any witnesses. However, the representative cannot answer questions on the employee's behalf.

7.3 ACAS Code of Practice

The ACAS statutory Code of Practice on disciplinary and grievance procedures sets out clear guidance for employers to follow. It is particularly useful on issues such as employee misconduct and incapability.

The Code is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992. Although it is itself not legally binding, it is considered to be persuasive by employment tribunals. Tribunals will also be able to adjust any awards made in relevant cases by up to 25% for unreasonable failure to comply with the Code. Copies of the Code can be downloaded from www.acas.org.uk
7.4 Data protection: the Employment Practices Code

Under the Data Protection Act 1998, employers have certain duties in respect of how they handle personal data, including that concerning their employees. The Employment Practices Code, issued under the Act, deals with the impact of data protection on the employment relationship. As with the ACAS Code above, adherence to the Employment Practices Code would be considered by the Information Commissioner in connection with any enforcement action.

The significance of the Employment Practices Code in relation to disciplinary and grievance matters relates to the accessing of data that might be used as evidence in a procedure. Specifically, individuals have a right to access information that is kept about themselves; and this right applies even if it impacts on an investigation into a disciplinary matter or grievance, or on a forthcoming hearing. The only exception is where it might prejudice a criminal investigation.

Given this, institutions should:

● ensure that records are of sufficient quality to support any conclusion drawn from them
● ensure that all records are kept securely
● not gather information by deception
● not continue to hold on file unsubstantiated allegations without exceptional reasons for doing so.

7.5 Dismissal

The most serious disciplinary penalty that an employer can impose is dismissal. As such, employees with sufficient qualifying service with an employer are protected from unfair dismissal.

There are, however, five fair reasons why an employee might be dismissed. These are listed in section 98(1) and (2) of the Employment Rights Act 1996 as:

● capability or qualifications
● conduct
● redundancy
● breach of statutory requirement
● some other substantial reason (SOSR).

Capability or qualifications relates to issues such as incompetence, inability to perform certain tasks, illness or lack of competence, and not achieving a required level of qualification.

Conduct includes misconduct, absenteeism, failure to obey reasonable instructions and dishonesty.

A redundancy dismissal is defined in section 139 of the Act. The key test is whether an employer will require fewer (or no) employees to do work of a particular kind, and not just whether the work itself has ceased or diminished.
Breach of statutory requirement is when an employer cannot be expected to continue to employ an employee if such employment would break the law, for example if a person is employed solely as a driver and that person is disqualified from driving under road traffic legislation.

SOSR is a rather ‘catch-all’ category. However, it has been held to cover, among other things, irreconcilable breakdowns between employees and refusal to adapt to change.

These reasons are, on their own, not necessarily sufficient to ensure that a dismissal will be considered fair by an employment tribunal. Indeed, in reaching a decision, a tribunal needs to be satisfied not only that the reason for the dismissal was for one of the potentially fair reasons set out above, but also on whether the employer had acted reasonably or not in the circumstances. Circumstances include issues such as the employer’s size, business needs and administrative resources.

In reaching their decision, a tribunal has to apply what is known as the ‘band of reasonable responses’ test. In other words, they must look at an employer’s reasons for the dismissal, taking account of the circumstances, and then decide whether the employer’s response – i.e. to dismiss – falls within a band of responses that a reasonable employer might have adopted.

A tribunal will also look for ‘fair play’ and at the fairness of the actual dismissal procedure. So, for example, an employer might be acting unreasonably, and therefore the dismissal might be unfair, if:

- in a case of incapability, the employee was not given fair warning or a chance to improve
- in a case of misconduct, there was not a full and fair investigation, or the employee was not able to present his or her case, and/or the employee was not allowed to appeal against the decision to dismiss
- in a case of redundancy, the employee was not warned or consulted, or the selection process was unfair.

So a tribunal will not assess the injustice or otherwise to the employee, or what it would have done had the tribunal itself been the employer. Nor can an employment tribunal substitute its own notion of what is reasonable behaviour on the part of the employer. The tribunal can only relate the employer’s action to its procedures, custom and practice, and standards within that particular industry. For schools and colleges, a tribunal will most likely expect procedures and practices to be well established and perhaps more detailed than, for example, those of a small private sector employer.
8 Conclusion

Dealing with a grievance or disciplinary problem is not something that anyone relishes, but when it does occur, it is important to handle things properly. Individuals will expect their case to be dealt with fairly; and certain legal rights may well apply, depending on the circumstances.

In this guide we have highlighted some of the pitfalls, but more importantly, we have concentrated on best practice. By following our guidance you will, we hope, avoid many of the problems that can lead to accusations of malpractice – or of the process being a foregone conclusion.

Above all, this guide aims to make a positive contribution to better employee relations.
Appendix

Seeking help from AMiE

AMiE members requiring help with a grievance or disciplinary problem, either as an individual affected by the issues, or as a manager involved in the process, can receive free advice by calling our employment relations telephone helpline:

01858 464 171

Alternatively, members can contact their AMiE Regional Officer direct. For details, please see the AMiE website:

www.amie.uk.com
Even in the best organisations, conflicts, complaints and other problems can occur. So developing good procedures and best practice is essential to deal with grievances and disciplinary problems. This guide is designed to help members and union representatives to review their current procedures and strive towards best practice. It looks at procedures, investigations, formal hearings and the outcomes of both disciplinary problems and grievances. There is also a short section on the law, to help you understand the legal context of dealing with disciplinary and grievance problems at work.