

# Dismissal OnDemand: Hints, Tips and Solution-Focused Answers for Employers in Scotland

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*What is an accused employee's right to disclosure, e.g. witness statements or the outcome of a grievance procedure? What can and should HR withhold?*

- Disciplinary situation
- Grievance situation
- ACAS Code of Practice
- Case Law

## **Disciplinary**

ACAS Code of Practice

Your own Company disciplinary procedures if applicable

Follow both and check your own procedures before acting on anything in this talk

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## Disciplinary (cont)

### ACAS Code [para 9]

*“If it is decided that there is a **disciplinary case to answer**, the employee should be notified of this in writing. This notification should contain **sufficient information about the alleged misconduct** or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would **normally be appropriate to provide copies of any written evidence**, which may include any witness statements, with the notification”.*

## Disciplinary (cont)

ACAS Guide [page 20 preparing for a discp hearing]

*“Ensure that all relevant facts are available including, where appropriate, written witness statements”*

*“Allow the employee time to prepare his [or her!] case. Copies of any relevant papers and witness statements should be made available to the employee in advance”*

## Disciplinary (cont)

### Investigation is key

*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

## Disciplinary (cont)

### Investigation

*If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.*

**Check your own procedures.** Under the ACAS Code there is no right to disclosure prior to investigatory/fact finding meeting.

## Case Law on Disciplinary Disclosure

### *Hussain v Elonex plc [1999] IRLR 420*

- Failure to disclose actual copies of the evidence not fatal to fairness in this case.
- What is key is that the employee has sufficient detail about the case against them
- Fairly old case

## Case Law (cont)

*Tycocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust UKEAT/0081/16*

- Nurse dismissed following a disciplinary hearing
- Various witnesses were interviewed and the employer did not disclose the investigation notes re all of the witness interviews
- Unfair dismissal

## Case Law (cont)

### *Turnbull v Mecca Bingo Ltd [2002] EAT*

Ms Turnbull dismissed for some quite violent bullying

- Paper towels soaked in hot oil, sugar down throat and pepper up nose all examples of her attacks on a colleague
- Turnbull worked with accomplices
- Victim employee had to flee Glasgow and her colleagues were too scared to come forward for fear of retaliation
- Employer justified in providing less disclosure to Turnbull than usual – but noted as being exceptional circumstances.

## Grievance Angle

What rights of disclosure does an employee have if a colleague lodges a grievance about them?

Caveat – employee could probably obtain a copy by way of subject access request. I will not be encroaching onto data protection territory in this talk.

## Grievance (cont)

No legal right or principle of natural justice which requires an employee to be told about, or shown a copy of a grievance which has been lodged about them

## Grievance (cont)

Reasons why you might not disclose:-

- Preliminary investigations show that the grievance is misconceived and you can reject it without involving the employee about whom the grievance is lodged
- Concerns about witness confidentiality – need to strike a balancing act between the witness rights and the rights of the individual.

## Grievance (cont)

Reasons why you should disclose:-

- Fairness applies as much to the “accused” as it does to the grievance lodger.
- Difficult for the person to respond without knowing the substance.
- Consider as a minimum, disclosing key extracts from the grievance if not the whole thing

## Summary

- *By the time you get to a disciplinary hearing, chances are you will have to disclose everything which you indent on taking into account*
- *Investigation stage might be the time to “ambush” e.g. if you want to see a natural, unrehearsed, reaction*
- *Witness anonymity possible but with care and balancing act before deciding*
- **Beware**
- **Be aware**
- **Be fair**

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