



# DISCIPLINARY ACTIONS AND DISMISSALS HANDLING THE PROCESSES FAIRLY

Paul Griffin, Amanda Sanders and Joanna MacKenzie of Norton Rose Fulbright LLP consider how to handle disciplinary and dismissal matters, and the additional requirements that employers should consider in light of the COVID-19 pandemic and the future workplace.

Employers are obliged to have in place a dismissal and disciplinary procedure under section 3(1) of the Employment Rights Act 1996 (ERA). Aside from this being a legal requirement, it is useful to have a dismissal and disciplinary procedure in place so that employees understand what standards of behaviour are expected of them, what constitutes misconduct, what process will be followed if they fail to comply with the necessary standards and what possible sanctions can be imposed.

A clear and well-drafted dismissal and disciplinary procedure is also a useful tool for managers to ensure that they handle dismissals and disciplinary matters fairly and consistently, which will reduce the likelihood of legal action and assist employers in successfully defending any claims brought by employees.

In light of the COVID-19 pandemic, employers need to consider whether it is fair or reasonable to conduct any disciplinary or dismissal procedures while employees are working from home, are not in the workplace due to public health guidance, or are on furlough, and whether any changes need to be made to their current procedures to take these circumstances into account. Employers may also want to clarify what new circumstances, if any, will amount to misconduct while employees are working away from the office. A review of the disciplinary procedures will be important in the future if, as seems likely, more employees continue to work from home.

This article discusses:

- The legal protection against unfair dismissal.

- The steps involved in carrying out a disciplinary and dismissal procedure.
- The additional requirements that employers should consider in light of the COVID-19 pandemic.

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## KEY LEGAL PRINCIPLES

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An employee has the right not to be unfairly dismissed (*section 94, ERA*). A dismissal will be unfair if the employer does not have a fair reason for the dismissal (such as misconduct or poor performance), does not act reasonably or does not follow the correct process in carrying out the dismissal. To defend an unfair dismissal claim successfully, the employer must therefore be able to show not only that the reason given is sufficient to justify the dismissal, but also that a fair procedure was followed.

The right to bring an unfair dismissal claim is only available to an employee (not a worker or self-employed person) who has a minimum of two years of continuous service with their employer, and the claim must be brought within three months of the date of termination of employment.

### A fair procedure

When dismissing an employee for misconduct, employers should consider and follow their internal dismissal and disciplinary procedure, or capability procedure if the dismissal is for poor performance, as well as the Acas Code of Practice on Disciplinary and Grievance Procedures (the Acas code) ([www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html](http://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html)). The Acas code provides practical guidance on how to carry out fairly disciplinary procedures for misconduct and poor performance (see box "Acas Code of Practice").

Although the Acas code is not legally binding, an unreasonable failure to comply with it may render a dismissal unfair and may increase the amount of compensation that a tribunal may award the employee by up to 25%.

When considering whether a dismissal for misconduct is fair or unfair, an employment tribunal will assess the reasonableness of the employer's actions in the circumstances. This is done by reference to the *Burchell* test (see box "The Burchell test").

If each of the elements of the *Burchell* test has been met, and the decision to dismiss the employee falls within the range of reasonable responses that an employer might have taken in the circumstances, the decision will likely be considered fair. Importantly, the employer does not have to prove that the employee was guilty of the misconduct. The employer must have had a reasonable belief that the employee was guilty of the misconduct and come to a reasonable decision after a reasonable investigation.

Examples of what might deem an employer's action to dismiss an employee as unreasonable and not meeting the *Burchell* test include:

- Failing to conduct an investigation or conducting an inadequate investigation.
- Not giving sufficient weight to evidence that points towards an employee's innocence.

## Acas Code of Practice

The Acas Code of Practice on Disciplinary and Grievance Procedures emphasises, in particular, that:

- Issues should be raised and dealt with promptly, and both employers and employees should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Both employers and employees should act consistently.
- Employers should conduct any necessary investigations to establish the facts.
- Employers should inform employees of any problems and give them an opportunity to put their case in response before taking action.
- Employees have the right to be accompanied by a colleague or trade union representative at a formal disciplinary meeting.
- Employees have the right to appeal against any formal decision.

- Failing to take into account other relevant factors, such as an employee's long-standing good conduct and integrity.
- Dismissing the employee on the grounds of gross misconduct for a trivial matter.

## MANAGING THE PROCESS

A disciplinary and dismissal procedure should set out the steps that an employer will take to address misconduct. Outside of the COVID-19 pandemic, this will typically include carrying out an investigation, gathering evidence, speaking to the relevant employee and interviewing any witnesses in person, and holding a disciplinary hearing and any appeal in person.

### Informal resolution

Before instigating formal disciplinary proceedings, an employer should first consider whether formal action is required.

The Acas code encourages informal resolution where appropriate. An informal discussion with an employee may be all that is needed to alert the employee that the conduct in question is not acceptable and to stop it from occurring again in the future. This can often be a better way of dealing with an issue without having to start an investigation. Any informal discussion should be conducted in private and be kept confidential. A record of the conversation should be taken and it is a good idea to send an email or memo to the employee after the meeting setting out what

was discussed and any consequences should the employee engage in the conduct again. For example, the employee could be put on notice that disciplinary action will follow if there is no change in the conduct.

If an informal approach is unsuccessful in resolving the issue, a more thorough investigation may be necessary.

### Formal action

If informal action has not resolved an issue or if the issue is sufficiently serious that informal action would not be appropriate, the employer will need to start a formal disciplinary process.

Before starting formal action, the employer should always:

- Review the requirements set out in its disciplinary and dismissal procedure.
- Decide who to appoint as investigator, keeping in mind the general requirement set out in the Acas code of having different individuals managing each stage of the process, that is, the investigation, the disciplinary meeting and any appeal. The employee's direct manager will usually be the most appropriate person.
- Consider whether an employee should be suspended from work while a formal investigation takes place (see box "The decision to suspend").

## Conducting an investigation

Where formal action is to be taken, a fair and balanced investigation will be required to establish the facts of the matter. The Acas code makes it clear that investigation is an important part of the process in determining a fair procedure. The amount of investigation to be undertaken will depend on the individual circumstances of the case but it must be sufficient to enable the chair of any subsequent disciplinary hearing (the chair) to form reasonable grounds for believing or disbelieving the allegations against the employee and to enable the case to be put to the employee in a manner that makes it clear what is being alleged.

In cases of alleged misconduct, an employer will usually need to interview witnesses, including other employees, and potentially gather any other relevant evidence. Interviews should be held in private and notes should be taken of the meeting. The investigation must be fair and balanced, so it is important to ensure that any witnesses who may support the employee's version of events are also interviewed. If a witness asks to remain anonymous, the employer should explore the reason for this request and any underlying motive, and balance the request for anonymity against the employee's need to know the details of the evidence for and against them.

An investigatory meeting with the employee in question will also usually be required at an early stage. This is important as there may be a simple misunderstanding that can be resolved without the need for a disciplinary hearing. In other cases, the employee under investigation may be able to direct the employer to witnesses or documentary evidence that support their case. The right to be accompanied does not necessarily apply during investigative meetings. However, an employer should review its disciplinary and dismissal procedure to check whether this entitles the employee to be accompanied.

## Disciplinary hearing

Once the investigation is complete, the employer must decide whether a disciplinary hearing is required.

If a disciplinary hearing is required, the employee should be informed of this in writing and invited to attend a disciplinary hearing (see box "Notifying the employee of the hearing").

## The Burchell test

The *Burchell* test, which was established in *British Home Stores Ltd v Burchell*, consists of three key elements:

- Whether the employer reasonably believed that the employee was guilty of the alleged misconduct.
- Whether the employer had reasonable grounds on which to base that belief.
- Whether, at the time it held that belief, the employer carried out as much investigation as was reasonable ([1978] IRLR 379).

Sufficient time should be allowed between sending the letter and holding the disciplinary hearing for the employee to consider the allegations and the evidence sent with the letter, and to prepare their case for the hearing. The length of this period will depend on the nature of the allegations and the complexity of the case but, in most cases, a period of three to five working days will be appropriate. Reasons for any further delay should be explained to the employee.

**Failure to attend.** If an employee fails to attend a disciplinary hearing through unforeseen circumstances such as illness, or wishes to adjourn due to their own or their companion's unavailability, a further meeting should be arranged within a reasonable timescale. If the employee persistently seeks to postpone the meeting or fails to attend without good reason, it may be possible to take a decision in the employee's absence. If the employee is unwell, consideration can be given to conducting a disciplinary hearing at or near their home or by telephone, or postponing until a medical certificate has been obtained to give a better picture of the likely prognosis. There is a fine balancing act between treating the employee fairly and ensuring that necessary business decisions are not postponed indefinitely.

**Companions.** If the employee chooses to be accompanied by a trade union representative or a colleague, the employee's companion is permitted to address the hearing and ask questions but must not answer any questions on the employee's behalf. The employee and their companion must be allowed to confer in private during the hearing.

**Process.** The disciplinary hearing should be conducted by a single manager or a panel. The chair should not have been involved in the investigation, whether as the investigator or

as a witness. If the matter is complex, it may be appropriate to have a member of the HR department present in an advisory capacity.

Someone should take notes of the hearing. Ideally, they should not have been involved in the investigation. The employee should be informed that this person is present to take notes for both parties and that a copy of the notes will be provided following the disciplinary hearing. It is good practice to have the employee sign the notes to confirm their agreement to the accuracy of the notes taken.

**Conducting the hearing.** At the start of the hearing, the chair should:

- Introduce those present and explain why they are there and the purpose of the meeting.
- If the employee is unaccompanied, remind the employee of their right to be accompanied.
- Explain how the meeting will be conducted, that is:
  - the chair will hear the statement of the complaint or details of the misconduct;
  - the employee will be provided with the opportunity to reply and provide an explanation;
  - there will be an opportunity for general questioning and discussion; and
  - the employer will sum up the proceedings.
- Ask the employee if they are satisfied with the arrangements for the hearing and have received, read and understood

all the necessary documents, including the disciplinary procedure, any report of the investigation and any witness statements. If the employee is disabled, the issue of reasonable adjustments should already have been addressed, however, a final check would be prudent.

The employee should then be taken carefully through the allegations that have been made and all the relevant evidence.

After that, the employee should be given the opportunity to make any representations, ask questions, and produce or discuss documentary evidence in reply. There is no need for the employer to call all relevant witnesses to the hearing; the matter can be dealt with by witness statements alone. However, the employee should be allowed to call relevant witnesses to the hearing if they wish. Where credibility is an issue, that is, the issue concerns one person's word against another, then it is advisable to call relevant witnesses so that the chair can form a view of the veracity of the evidence.

The Acas code does not require the chair to allow the cross-examination of witnesses. The employee should be allowed to raise points in response to anything a witness has said. However, if the employer's internal disciplinary and dismissal procedure allows cross-examination, this procedure should be followed.

Once the employee has presented their case, the chair should summarise the information put forward on both sides and request any necessary clarification from the employee. At any stage during the hearing, if the chair requires further clarification, the hearing can be adjourned and reconvened at a later time or date.

At the end of the hearing, there should be an adjournment for the chair to consider what the employee has said. If any further investigation is required, the employee should be given a chance to respond to any new findings at a reconvened hearing. If new information has come to light, this should be given to the employee in writing in sufficient time for the employee to consider it before the reconvened hearing.

Even if the chair has an idea as to the appropriate decision at the end of the hearing, it is always good practice to adjourn to take time for consideration. This makes it less

## The decision to suspend

An employee may need to be suspended from work while a formal investigation takes place if it would be impossible to conduct an investigation with the employee present; for example, because there is a risk that the employee may destroy evidence or attempt to influence witnesses, or where relationships at work have broken down. An employer must be careful when deciding to suspend an employee and must not adopt suspension as a "knee-jerk" reaction (see Briefing "Suspending employees: avoiding a knee-jerk reaction", [www.practicallaw.com/w-012-8510](http://www.practicallaw.com/w-012-8510)).

The employer should be satisfied that it has reasonable grounds for the suspension in order to avoid breaching the implied term of mutual trust and confidence. Each case is fact specific and the Court of Appeal in *Lambeth LBC v Agoreyo* held that, although suspension can constitute a breach of the implied term of mutual trust and confidence, each case must be treated on its own facts ([2019] EWCA Civ 322). In *Agoreyo*, the employer had reasonable and proper cause to suspend the employee. Suspension should generally be on full pay with contractual benefits and an employee should be sent formal notification of being placed on suspension and the expected duration. The period of suspension should be as short as possible and kept under regular review.

likely that the matter will be seen to have been prejudged.

The length of any adjournment will depend on the complexity of the issues to be considered and whether further investigation is needed. It is helpful to give the employee an indication of how long it is likely to be before the meeting is reconvened and the decision is handed down. If the adjournment is for only a short period, the chair may wish to leave the employee in the meeting room while they consider their decision. However, in most cases, it is sensible to adjourn at least until the following day.

### The decision

There are two main aspects to the decision: whether the chair upholds the allegations of misconduct and, if they do, what sanction should be imposed as a result.

In reaching a decision, the chair should take into account:

- Any explanation provided by the employee and the circumstances of the matter.
- The employee's disciplinary and general record, including any "live" warnings on their personnel file.
- The action taken in any previous similar cases.
- Whether the dismissal and disciplinary procedure indicates the likely penalty.

- Whether the penalty is reasonable and matches the offence or complaint.

The decision might be to:

- Take no action.
- Issue the employee with a verbal warning, a written warning or a final warning.
- Order a demotion, redeployment or even dismissal.
- Order any other action that may resolve a problem, such as an agreement to mediate with a co-worker with whom the employee has been having problems.

**Alternatives to dismissal.** Consideration must be given to other alternatives before dismissal is deemed appropriate. It is usually considered fair to give an employee two written warnings before deciding to dismiss them. It is a good idea to set out in the disciplinary and dismissal procedure the scale of warnings to be used and how many warnings are needed before a final warning or dismissal. Except in cases of gross misconduct, employees should not be dismissed without any prior warning. A decision to dismiss should be taken only by a manager who has the authority to do so.

**Explaining the decision.** Once the chair has reached a decision, the meeting should ideally be reconvened and the decision explained to the employee. If disciplinary

action is to be taken, the decision must also be given to the employee in writing, but it is usually better first done face-to-face. The employee should be advised of the sanction and the reasons for imposing it. If a warning is imposed, the length of the warning should be given, and the consequences of any further misconduct or failure to improve must be made clear.

**Right to appeal.** The employee should be advised that they have a right to submit a written appeal. Instructions on how to appeal should also be provided, including the name of the person to whom the appeal must be submitted and the timescale for appeal. Five working days is generally considered reasonable but there is no specific time limit in the Acas code, so an employer should take legal advice before rejecting an appeal as being out of time.

### Appeals

An appeal may be based on various grounds, including new evidence having come to light, or the severity or inconsistency of the decision or action imposed. A request for an appeal should be made in writing.

So far as possible, appeals should be heard without unreasonable delay and should be dealt with impartially by someone who has not previously been involved in the matter. Ideally, that person should be someone more senior than the chair of the disciplinary hearing and, where possible, outside of the relevant employee's direct reporting line.

The person conducting the appeal should have access to the evidence compiled during the investigation and copies of the notes from the disciplinary meeting but should not confer with the initial decision maker.

There is no set format for the appeal, provided that the employee is allowed adequate opportunity to present their arguments. The person chairing it should aim to be as impartial as possible. If the original hearing was procedurally flawed or new evidence has come to light, the appeal should be conducted as a full rehearing of all the evidence. In other cases, it may be acceptable simply to review the original decision based on the paperwork and any representations the employee may make.

Employees have the same right to be accompanied at an appeal hearing as at a disciplinary hearing.

## Notifying the employee of the hearing

The letter inviting an employee to attend a disciplinary hearing should:

- Set out the employee's alleged conduct or characteristics, or other circumstances, that led the employer to contemplate dismissing or taking disciplinary action against the employee. Sufficient information should be included about the allegations and the possible consequences to enable the employee to prepare for the hearing.
- Enclose copies of any documentary evidence to support the allegations, such as witness statements. The employee should be told if the employer intends to call any witnesses at the hearing or just rely on the statements.
- Inform the employee of the time and place of the disciplinary hearing, which should be reasonable.
- Make clear that the employee has the right to be accompanied to the hearing by a trade union representative or a colleague.
- Enquire whether the employee has any disability or other special requirements for which reasonable adjustments may need to be made.
- Make it clear if the employee is facing possible dismissal.
- Enclose a copy of the employer's disciplinary and dismissal procedure, if the employee has not already been given this, so that they understand the process.

### COVID-19 PANDEMIC

Disciplinary and grievance issues continue to arise during the COVID-19 pandemic, and it is an employer's responsibility to decide if it is fair and reasonable to start or resume disciplinary proceedings while employees are not in the workplace. The fact that employees are working remotely or are on furlough does not permit employers to depart from, or fail to comply with, any disciplinary and dismissal procedure that they have in place.

In May 2020, Acas produced a guide for employers on conducting disciplinary or grievance procedures during the COVID-19 pandemic (the Acas guidance) ([www.acas.org.uk/disciplinary-grievance-procedures-during-coronavirus](http://www.acas.org.uk/disciplinary-grievance-procedures-during-coronavirus)). The Acas guidance supplements the Acas code, which continues to apply, and provides advice on how to approach the particular challenges posed by social distancing and remote working. The Acas guidance emphasises that employers should not use the current situation to circumvent proper procedures. Employers should continue to follow their existing disciplinary and dismissal procedure and templates. However, these may have to be adapted to

address additional issues and ensure that the procedure is fair.

### Fair and reasonable

The Acas guidance recommends that where an employer is considering starting or resuming disciplinary proceedings, it must first consider whether it is fair and reasonable to do so in the current circumstances. This involves three main considerations.

**Employees.** The employer needs to consider the health and wellbeing of the employee, and the particulars of their individual circumstances. Employees may be under greater levels of stress and anxiety because of the pandemic, and may have additional obligations, such as childcare, that may affect their ability to participate.

**Public health.** Employers need to consider if disciplinary proceedings can be undertaken in a manner that complies with public health guidance, particularly in respect of social distancing, the use of face masks, any limits of the number of people that can gather indoors, and the closure or reopening of workplaces. An employer will need to explore whether interviews and meetings can be carried out safely in person, in cases where employees

are still going into the workplace, or if they should be conducted online through video conferencing technologies, and if there are any issues regarding access to that technology.

**Urgency.** Employers should consider whether the matter needs to be dealt with urgently or if it can be postponed to a later date, such as when employees have returned to the workplace. This will largely depend on the seriousness of the allegations and should be discussed with all relevant participants. If, for example, the matter relates to gross misconduct and the employee is suspended, the employer should continue with the investigation and hold a disciplinary hearing. However, if the matter is a minor disciplinary issue, it may be appropriate to consider if it can be postponed to a later date.

The employee may decide that they wish to proceed rather than having any allegations pending against them for a considerable period of time. Indeed, an unreasonable delay may lead to the employee being able to bring a claim for constructive unfair dismissal as well as causing them additional stress. An unreasonable delay in holding the disciplinary procedure may amount to a breach of the Acas code and therefore result in the 25% uplift in respect of a successful employment tribunal claim.

As it currently appears that the majority of employees will be working remotely for the foreseeable future, an employer should weigh up the prospect of a long delay with the need to resolve the matter and any other relevant circumstances.

### Employees on furlough

The Acas guidance states that if an employee is on furlough, they can still participate in a disciplinary or grievance investigation provided that HM Revenue & Customs' (HMRC) guidance on the Coronavirus Job Retention Scheme (CJRS) (HMRC guidance) and the Treasury Directions are followed ([www.practicallaw.com/w-028-4473](http://www.practicallaw.com/w-028-4473); [www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme?; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/955806/210120\\_CJRS\\_DIRECTION\\_No\\_6\\_\\_CJRS\\_extension\\_1\\_February\\_-\\_31\\_April\\_-\\_signed\\_\\_2\\_.pdf](http://www.gov.uk/guidance/check-if-you-could-be-covered-by-the-coronavirus-job-retention-scheme?; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/955806/210120_CJRS_DIRECTION_No_6__CJRS_extension_1_February_-_31_April_-_signed__2_.pdf)). Specifically, the HMRC guidance provides that, while on furlough and to be eligible to

receive wages under the CJRS, an employee cannot undertake any work that makes money or provides services for the employer or any linked or associated organisation.

The HMRC guidance also clarifies that if an employee is a union or non-union employee representative, they can carry out activities for the purpose of individual or collective representation. This means that, to participate in a disciplinary procedure in any capacity, including as the subject of the investigation, as chair, a notetaker, a witness or a companion, the employee must do so voluntarily and in a way that complies with public health guidance.

The position that participation in disciplinary procedures should be voluntary is problematic. It is unlikely that an employee who is acting as chair or a notetaker will be taking on this role voluntarily and this may well affect the employer's right to claim reimbursement of the employee's wages under the CJRS. It is also unlikely that an employee's participation in disciplinary procedures involving their own misconduct will be voluntary. This means that any activities in relation to a disciplinary hearing could count as providing a service to an employer and therefore constitute "work", meaning again that the employer will not be able to seek reimbursement.

If the employer is incorrect in its analysis, any payment from the government under the CJRS may be withheld or will need to be repaid. The employer will therefore need to consider if it is more appropriate to bring the employee off furlough for a period in order to carry out the procedure or delay the procedure until the end of the furlough scheme. However, in deciding whether to defer the procedure, the employer must bear in mind the points raised below (*see "Fair and reasonable" above*).

### Virtual investigations

There are specific difficulties in conducting a workplace investigation remotely but, in order to ensure that a fair procedure is followed, the employer must still carry out a fair and thorough investigation.

The Acas guidance identifies a number of issues in carrying out an investigation remotely, including difficulties in accessing all the relevant documents and evidence needed for the investigation if the office is closed, and in providing copies of the evidence or any witness statements to the employee. If

the relevant evidence cannot be accessed or provided, the fairness of the procedure will be jeopardised.

One of the dangers of remote working is that people can be more informal in their communications and are more likely to send information by way of instant messaging, which an employer may find more difficult to recover. Employers should make it clear to employees the appropriate nature of work communications and that information sent by instant messaging may be disclosed as part of an investigation. However, employers need to be careful that using this information is not a breach of privacy under Article 8 of the European Convention on Human Rights.

### Remote proceedings

If it is considered fair and reasonable to proceed with the disciplinary proceedings and this is being done remotely, the principles of fairness and reasonableness as set out in the Acas code will need to be followed.

**Video conferencing.** Conducting a disciplinary procedure remotely will likely involve the use of video-conferencing technologies, and an employer will need to consider whether:

- The individuals involved have adequate access to the necessary technologies.
- Adjustments are needed for those with disability or accessibility issues.
- It is possible fairly to assess and question evidence given by individuals interviewed by video conference.
- An employee's right to be accompanied during a hearing can still be fulfilled.

In considering what form of video-conferencing technology to use, employers should consider whether the employee is familiar with using this type of technology. If using a platform that the employee has little to no experience using, it could be sensible to provide them with instructions or the opportunity to access it ahead of any meeting. The employer should consider whether the technology can display documents, record the meeting or hearing if necessary, and has a function that enables the employee to communicate with their companion off screen.

The employer should also explore whether the technology allows all of the participants

to access the documents during the meeting. If not, the parties need to be clear on how the documents will be distributed and referred to so that everyone is clear as to what documents are being discussed. The documents being relied on need to be sent to the employee before the hearing and the employer should consider how this will be done, whether through a platform, email or some other document system.

The employer should take steps to ensure that it is seen to be taking the disciplinary hearing seriously and this can be achieved by providing the right impression in the dress of the participants in the meeting and the video conference background.

**Confidentiality.** The employer needs to consider the confidentiality of the parties participating in a remote hearing. It is a good idea to confirm with the employee beforehand that they have a quiet space at home, or a time during the day where it is easier to ensure that they will not be disturbed, particularly if they have childcare responsibilities.

**Companion's participation.** The right to be accompanied at a disciplinary hearing still applies even if the hearing is being conducted remotely. The employer will therefore need to check that the employee's chosen companion has access to the technology for the hearing, including the possibility of breakout rooms or a separate channel for the employee and the companion to communicate in private. The employer needs to bear in mind any security issues with this set-up. The Acas guidance states that employers should be prepared to show greater flexibility where the companion is unable to attend the original time or date set for the hearing, and recommends in these circumstances being prepared to delay the meeting by more than the usual five days.

**Recording.** It may be possible for the employer to record the disciplinary hearing. However, this should only be done with the agreement of everyone involved. If there is agreement to digitally record a meeting, this should be done in accordance with data protection law regarding the collection and processing of data. It is more difficult in a remote situation to ensure that there is no covert recording, but employees should be reminded if there is an express prohibition on recording in the procedure.

## Related information

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## FUTURE CONSIDERATIONS

The general consensus is that the workplace is changing: in the future, fewer people will be working from the office on a full-time basis, and there will be more flexible and atypical working arrangements (see *feature article "Homeworking in the wake of COVID-19: issues for employers"*, [www.practicallaw.com/w-027-8073](https://practicallaw.com/w-027-8073)). The issues that are raised in this article will continue to apply and the Acas guidance will continue to be of use.

Any formal agreement with an employee to work from home should include further information as to what new circumstances or forms of behaviour will amount to misconduct and a breach of expected standards of behaviour. Working remotely can lead to more issues of bullying and harassment, and this may have a greater impact on employees. If employers have not already

provided guidance, they should include examples of cyber bullying and harassment in the disciplinary policy. Employers should also have clear cyber security policies that give clear indications of what amounts to disciplinary breaches.

In addition, employers should consider changes to their disciplinary policies and procedures to consider whether remote hearings will still be permitted and which of the parties are entitled to ask for the hearing to be held remotely.

With the pandemic continuing and consequent change in the workplace, employers must adopt a fair and flexible approach to disciplinary procedures.

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