# CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE PROCEDURES

**ADVISORY CONCILIATION AND ARBITRATION SERVICE**
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# Preamble

This Code from pages 4 to 25 is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992 and was laid before both Houses of Parliament on 7 June 2000. The Code comes into effect by order of the Secretary of State on 4 September 2000.

A failure on the part of any person to observe any provision of this Code of Practice does not of itself render that person liable to any proceedings. In any proceedings before an employment tribunal any Code of Practice issued under sections 199 and 201 of the Trade Union and Labour Relations (Consolidation) Act 1992 is admissible in evidence and any provision of the Code which appears to the tribunal to be relevant to any question arising in the proceedings is required to be taken into account in determining that question. (Trade Union and Labour Relations (Consolidation) Act 1992, section 207) This Code has also to be taken into account by the arbitrators appointed by ACAS to determine cases brought under the ACAS Arbitration Scheme (see Section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992).

Some of the provisions referred to in this code only apply by statute to employees. But others, such as the right to be accompanied at disciplinary and grievance hearings, apply to all workers. This Code is about good employment practice. Therefore where workers are involved in grievance and disciplinary proceedings, it would be good practice to apply the standards set out in the guidelines in sections one and two to those proceedings.

For ease of reference, text in **bold** type in this code summarises statutory provisions, whilst practical guidance is set out in ordinary type. Whilst every effort has been made to ensure that the explanations included in the Code are accurate, only the Courts or Tribunals can give authoritative interpretations of the law.

# Introduction

This code aims to help employers, workers and their representatives by giving practical guidance on how to deal with disciplinary and grievance issues in employment. It also provides guidance on the statutory right of a worker to be accompanied at a disciplinary or grievance hearing. In small establishments it may not be practicable to adopt all the detailed provisions relating to disciplinary and grievance procedures, but most of the essential features listed in paragraphs 9 and 38 to 41 could be adopted and incorporated into a simple procedure.

Disciplinary issues arise when problems of conduct or capability are identified by the employer and management seeks to address them through well recognised procedures. In contrast, grievances are raised by individuals bringing to management's attention concerns or complaints about their working environment, terms and conditions and work-place relationships.

The code is divided into three sections as follows

Section 1 - deals with disciplinary practice and procedures;

Section 2 - considers the handling of grievances

Section 3 - is concerned with the statutory right to be accompanied at disciplinary and grievance hearings.

# Section 1 - Disciplinary practice and procedures in employment

## Why have disciplinary rules and procedures?

1. Disciplinary rules and procedures are necessary for promoting orderly employment relations as well as fairness and consistency in the treatment of individuals. They enable organisations to influence the conduct of workers and deal with problems of poor performance and attendance thereby assisting organisations to operate effectively. Rules set standards of conduct and performance at work; procedures help ensure that the standards are adhered to and also provide a fair method of dealing with alleged failures to observe them.

2. It is important that workers know what standards of conduct and performance are expected of them. The Employment Rights Act 1996 requires employers to provide written information for their employees about certain aspects of their disciplinary rules and procedures.[1] Managers should also know and be able to apply the rules and the procedures they are required to follow.

3. The importance of having disciplinary rules and procedures and ensuring that they are followed has also been recognised by the law relating to dismissals, since the grounds for dismissal and the way in which the dismissal has been handled can be challenged before an employment tribunal or an ACAS-appointed arbitrator.[2] Where either of these is found by a tribunal or arbitrator to have been unfair, the employer may be ordered to re-instate or re-engage the employees concerned where requested and may be liable to pay compensation to them. In coming to a decision about the fairness or otherwise of a dismissal, the tribunal, or arbitrator, will consider whether the employer acted reasonably in all the circumstances, having regard to the size and administrative resources of the undertaking.

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[1] **Section 1 of the Employment Rights Act 1996 requires employers to provide employees with a written statement of particulars of employment. Such statements must also specify any disciplinary rules applicable to them and indicate the person to whom they should apply if they are dissatisfied with any disciplinary decision. The statement should explain any further steps which exist in any procedure for dealing with disciplinary decisions. The employer may satisfy certain of these requirements by referring the employees to a reasonably accessible document which provides the necessary information. The statutory requirements relating to disciplinary rules and procedures do not apply where on the day the employee's employment began the total number of employees employed by the employer and any associated employer was less than twenty.**

[2] **Section 111 (2) of the Employment Rights Act 1996 specifies that a complaint of unfair dismissal has to be presented to an employment tribunal before the end of the three month period beginning with the effective date of termination.**

## Formulating policy

4. Management is responsible for maintaining discipline and setting standards of performance within the organisation and for ensuring that there are appropriate disciplinary rules and procedures covering issues of worker conduct and capability. If they are to be fully effective, however, the rules and procedures need to be accepted as reasonable both by those who are covered by them and those who operate them. Management should therefore aim to secure the involvement of workers and where appropriate their representatives and all levels of management when formulating new or revising existing rules and procedures. Where trade unions are recognised, trade union officials[3] may, or may not, wish to participate in the formulation of the rules but they should participate fully with management in agreeing the procedural arrangements which will apply and in seeing that these arrangements are used properly, fairly and consistently.

## Rules

5. When drawing up disciplinary rules, the aim should be to specify clearly and concisely those that are necessary for the efficient and safe performance of work and for the maintenance of satisfactory relations within the workforce and between workers and management. It is unlikely that any set of disciplinary rules can cover all circumstances that may arise. However, it is usual that rules would cover issues such as misconduct, sub-standard performance (where not covered by a separate capability procedure), harassment or victimisation, misuse of company facilities including computer facilities (eg, e-mail and the Internet), poor timekeeping and unauthorised absences. The rules required will necessarily vary according to particular circumstances, such as the type of work, working conditions and size and location of the workplace. Whatever set of rules are eventually drawn up they should not be so general as to be meaningless.

6. Rules should be set out clearly and concisely in writing and be readily available to all workers, for example in handbooks or on company Intranet sites. Management should make every effort to ensure that all workers know and understand the rules including those whose first language is not English or who have a disability or impairment (eg, the inability to read). This may best be achieved by giving every worker a copy of the rules and explaining them orally. In the case of

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[3] **Throughout this code, trade union official has the meaning assigned to it by section 119 of the Trade Union and Labour Relations (Consolidation) Act 1992 and means, broadly, officers of the union, its branches and sections, and anyone else, including fellow employees, appointed or elected under the union's rules to represent members.**

new workers this might form part of any induction programme . It is also important that managers at all levels and worker representatives are fully conversant with the disciplinary rules and that the rules are regularly checked and updated where necessary.

7. Workers should be made aware of the likely consequences of breaking disciplinary rules or failing to meet performance standards. In particular, they should be given a clear indication of the type of conduct, often referred to as gross misconduct, which may warrant summary dismissal (ie, dismissal without notice). Summary is not necessarily synonymous with instant and incidents of gross misconduct will usually still need to be investigated as part of a formal procedure. Acts which constitute gross misconduct are those resulting in a serious breach of contractual terms and will be for organisations to decide in the light of their own particular circumstances. However, they might include the following:

i) theft, fraud and deliberate falsification of records;
ii) physical violence;
iii) serious bullying or harassment;
iv) deliberate damage to property;
v) serious insubordination;
vi) misuse of an organisation's property or name;
vii) bringing the employer into serious disrepute;
viii) serious incapability whilst on duty brought on by alcohol or illegal drugs;
ix) serious negligence which causes or might cause unacceptable loss, damage or injury;
x) serious infringement of health and safety rules;
xi) serious breach of confidence (subject to the Public Interest (Disclosure) Act 1998).

As indicated earlier this list is not intended to be exhaustive.

## Essential features of disciplinary procedures

8. Disciplinary procedures should not be viewed primarily as a means of imposing sanctions. Rather they should be seen as a way of helping and encouraging improvement amongst workers whose conduct or standard of work is unsatisfactory. Some organisations may prefer to have separate procedures for dealing with issues of conduct and capability but it is important to remember that any hearing which might result in a formal warning or some other action will be covered by the provisions on accompaniment set out in the Employment Relations Act 1999 (see section three). Smaller organisations may wish to deal with issues of conduct and capability within one disciplinary procedure.

9. When drawing up and applying disciplinary procedures employers should have regard to the requirements of natural justice. This means workers should be informed in advance of any disciplinary hearing of the allegations that are being made against them together with the supporting evidence and be given the opportunity of challenging the allegations and evidence before decisions are reached. Workers should also be given the right of appeal against any decisions taken. Consequently good disciplinary procedures should:

i) be in writing;

ii) specify to whom they apply;

iii) be non-discriminatory;

iv) provide for matters to be dealt with without undue delay;

v) provide for proceedings, witness statements and records to be kept confidential;

vi) indicate the disciplinary actions which may be taken;

vii) specify the levels of management which have the authority to take the various forms of disciplinary action;

viii) provide for workers to be informed of the complaints against them and where possible all relevant evidence before any hearing;

ix) provide workers with an opportunity to state their case before decisions are reached;

x) provide workers with the right to be accompanied (see also section three for information on the statutory right to be accompanied);

xi) ensure that, except for gross misconduct, no worker is dismissed for a first breach of discipline;

xii) ensure that disciplinary action is not taken until the case has been carefully investigated;

xiii) ensure that workers are given an explanation for any penalty imposed;

xiv) provide a right of appeal - normally to a more senior manager - and specify the procedure to be followed.

10. It is important to ensure that all managers and, where appropriate, worker representatives understand the organisation's disciplinary procedure. Training in the use and operation of the procedure may also be appropriate. There can be benefits in undertaking such training on a joint basis.

## The procedure in operation

11. When a disciplinary matter arises, the relevant supervisor or manager should first establish the facts promptly before recollections fade, and where appropriate obtain statements from any available witnesses. It is important to keep a record for later reference. Having investigated all the facts the manager or supervisor should decide whether to, drop the matter; arrange informal coaching or counselling; or arrange for the matter to be dealt with under the disciplinary procedure.

12. Minor cases of misconduct and most cases of poor performance may best be dealt with by informal advice, coaching and counselling rather than through the disciplinary procedure. Sometimes managers may issue informal oral warnings - but they need to ensure that problems are discussed with the objective of encouraging and helping workers to improve. It is important that workers understand what needs to be done, how performance or conduct will be reviewed and over what period. Workers should also be made aware of what action will be taken if they fail to improve either their performance or conduct. Informal warnings and/or counselling are not part of the formal disciplinary procedure and the worker should be informed of this.

13. In certain circumstances, for example in cases involving gross misconduct, where relationships have broken down or where it is considered there are risks to an employer's property or responsibilities to other parties, consideration should be given to a brief period of suspension with pay whilst an unhindered investigation is conducted. Such a suspension should only be imposed after careful consideration and should be reviewed to ensure it is not unnecessarily protracted. It should be made clear that the suspension is not considered as disciplinary action.

14. Before a decision is reached or any disciplinary action taken there should be a disciplinary hearing at which workers have the opportunity to state their case and to answer the allegations that have been made. Wherever possible the hearing should be arranged at a mutually convenient time and in advance of the hearing the worker should be advised of any rights under the disciplinary procedure including the statutory right to be accompanied (see section three). Prior to this stage, where matters remain informal, the statutory right of accompaniment does not arise.

15. Where the facts of a case appear to call for formal disciplinary action a formal procedure should be followed. The type of procedure will vary according to the circumstances of the organisation. Depending on the outcome of the procedure some form of disciplinary action may be taken as follows:-

**First Warning:**

**Oral** - In the case of minor infringements the worker should be given a formal oral warning. Workers should be advised of the reason for the warning, that it constitutes the first step of the disciplinary procedure and of their right of appeal. A note of the oral warning should be kept but should be disregarded for disciplinary purposes after a specified period (eg, six months). Or

**Written** - If the infringement is regarded as more serious the worker should be given a formal written warning giving details of the complaint, the improvement or change in behaviour required, the timescale allowed for this and the right of appeal. The warning should also inform the worker that a final written warning may be considered if there is no sustained satisfactory improvement or change. A copy of the written warning should be kept on file but should be disregarded for disciplinary purposes after a specified period (eg, 12 months).

**Final written warning** - Where there is a failure to improve or change behaviour during the currency of a prior warning, or where the infringement is sufficiently serious, the worker should normally be given a final written warning. This should give details of the complaint, warn the worker that failure to improve or modify behaviour may lead to dismissal or to some other action short of dismissal and refer to the right of appeal. The final written warning should normally be disregarded for disciplinary purposes after a specified period (eg, 12 months).

**Dismissal or other sanction** - If the worker's conduct or performance still fails to improve the final step might be disciplinary transfer, disciplinary suspension without pay[4], demotion, loss of seniority, loss of increment (provided these penalties are allowed for in the contract) or dismissal. The decision to dismiss should be taken only by the appropriate designated manager and the worker should be informed as soon as reasonably practicable of the reasons for the dismissal, the date on which the contract between the parties will terminate, the appropriate period of notice (or pay in lieu of notice) and information on the right of appeal including how to

[4] Where a disciplinary suspension without pay is imposed it should not exceed any period allowed by the contract of employment.

make the appeal and to whom. The decision to dismiss should be confirmed in writing. Employees with one year's continuous service or more have the right, on request, to have a "written statement of particulars of reasons for dismissal[5]".

16. When deciding whether a disciplinary penalty is appropriate and what form it should take it is important to bear in mind the need to act reasonably in all the circumstances. Factors which might be relevant include, the extent to which standards have been breached, precedent, the worker's general record, position, length of service and special circumstances which might make it appropriate to adjust the severity of the penalty.

17. When operating disciplinary procedures employers should be particularly careful not to discriminate on the grounds of race, gender or disability, eg, whilst it is not unlawful to take disciplinary action against a pregnant woman for some reason unconnected with her pregnancy it is unlawful sex discrimination and automatically unfair to dismiss a woman on the grounds of her pregnancy.

18. In the course of a disciplinary case a worker might sometimes raise a grievance about the behaviour of the manager handling the case. Where this happens, and depending on the circumstances it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered. Consideration might also be given, where possible, to bringing in another manager to deal with the disciplinary case.

## Dealing with absence

19. When dealing with absence a distinction should always be made between absences on grounds of medically certificated illness, both physical and mental, and those which may call for disciplinary action. All unexpected absences should be investigated promptly and the worker asked to give an explanation[6]. If, after investigation, it appears that there were no acceptable reasons for the absence the matter should be treated as a conduct issue and be dealt with under the disciplinary procedure. It is important that the worker is told what improvement in attendance is expected and warned of the likely consequences if this does not happen.

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[5] The right to a written statement of reasons for dismissal applies automatically to employees dismissed while pregnant or during ordinary maternity leave without them having to request it.

[6] When considering the reasons for absence or sub-standard performance employers should bear in mind the provisions of the Disability Discrimination Act 1995. In particular employers should note the obligations placed on them by the Act to make reasonable adjustments when dealing with sickness related absences.

20. Where the absence is due to medically certificated illness the issue becomes one of capability and employers should take a sympathetic and considerate approach to these sort of absences. In deciding what action to take in these cases employers will need to take into account, the likelihood of an improvement in health and subsequent attendance (based where appropriate on professional medical advice), the availability of suitable alternative work, the effect of past and likely future absences on the organisation, how similar situations have been handled in the past and whether the illness is a result of a disability as defined in the Disability Discrimination Act 1995. Even though employers may have a separate procedure for dealing with illness any hearing which could result in a formal warning or some other action will attract the statutory right of accompaniment (see section three).

21. In cases of extended sick leave both statutory and contractual issues will need to be addressed and specialist advice may be necessary.

## Dealing with poor performance

22. Individuals have a contractual responsibility to perform to a satisfactory level and should be given every help and encouragement to do so. Employers have a responsibility for setting realistic and measurable standards of performance and for explaining these standards carefully to employees.

23. Where workers are found to be failing to perform to the required standard the matter should be investigated before any action is taken[6]. Where the reason for the sub standard performance is found to be a lack of the required skills the worker should, wherever practicable, be assisted through training or coaching and given reasonable time to reach the required standard. Where the sub standard performance is due to negligence or lack of application on the part of the worker then some form of disciplinary action will normally be appropriate. Failures to perform to the required standard can either be dealt with through the normal disciplinary procedure or through a separate capability procedure.

24. A worker should not normally be dismissed because of a failure to perform to the required standard unless warnings and an opportunity to improve (with reasonable targets and timescales) have been given. However, where a worker commits a single error due to negligence and the actual or potential consequences of that error are, or could be, extremely serious, warnings may not be appropriate. The disciplinary or capability procedure should indicate that summary dismissal action may be taken in such circumstances.

25. Employers may need to have special arrangements for dealing with poor performance of

workers on short-term contracts or new workers during their probationary period.

## Dealing with special situations

26. Certain situations will require special consideration.

*Workers to whom the full procedure is not immediately available***.** Special provisions may be necessary for the handling of disciplinary matters among nightshift workers, workers in isolated locations or depots or others who may pose particular problems.

*Trade union officials***.** Disciplinary action against a trade union official can lead to a serious dispute if it is seen as an attack on the union's functions. Although normal disciplinary standards should apply to their conduct as workers, if disciplinary action is contemplated then the case should be discussed with a senior trade union representative or full-time official.

*Criminal charges or convictions outside employment***.** These should not be treated as automatic reasons for dismissal. The main consideration should be whether the offence is one that makes workers unsuitable for their type of work. In all cases employers, having considered the facts, will need to consider whether the conduct is sufficiently serious to warrant instituting the disciplinary procedure. For instance, workers should not be dismissed solely because a charge against them is pending or because they are absent as a result of being remanded in custody.

## Appeals

27. The opportunity to appeal against a disciplinary decision is essential to natural justice. Workers may choose to raise appeals on a number of grounds which could include the perceived unfairness of the judgement, the severity of the penalty, new evidence coming to light or procedural irregularities. These grounds need to be considered when deciding the extent of any new investigation or re-hearing in order to remedy previous defects in the disciplinary process.

28. Appeals should be dealt with as promptly as possible. A time limit should be set within which appeals should be lodged. This time limit may vary between organisations but five working days for lodging an appeal is usually appropriate. A time limit should also be set for hearing the appeal.

29. Wherever possible the appeal should be heard by an appropriate individual, usually a senior

manager, not previously involved in the disciplinary procedure. In small organisations it may not be possible to find such an individual and in these circumstances the person dealing with the appeal should act as impartially as possible. Independent arbitration is sometimes an appropriate means of resolving disciplinary issues and where the parties concerned agree it may constitute the appeals stage of procedure.

30. Individuals should be informed of the arrangements for appeal hearings and also of their statutory or other right to be accompanied at these hearings (see section three). Where new evidence arises during the appeal the worker, or their representative, should be given the opportunity to comment before any action is taken. It may be more appropriate to adjourn the appeal to investigate or consider such points.

31. The worker should be informed of the results of the appeal and the reasons for the decision as soon as possible and this should be confirmed in writing. If the decision constitutes the final stage of the organisation's appeals procedure this should be made clear to the worker.

## Records

32. Records should be kept detailing the nature of any breach of disciplinary rules or unsatisfactory performance, the worker's defence or mitigation, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments. These records should be kept confidential and retained in accordance with the disciplinary procedure and the Data Protection Act 1998 which requires the release of certain data to individuals on their request. Copies of any meeting records should be given to the individual concerned although in certain circumstances some information may be withheld, for example to protect a witness.

## Further action

33. Rules and procedures should be reviewed periodically in the light of any developments in employment legislation or good employment practice and if necessary, revised in order to ensure their continuing relevance and effectiveness. Any amendments and additional rules imposing new obligations should be introduced only after reasonable notice has been given to all workers and, where appropriate, their representatives have been consulted. Except in very exceptional circumstances, where legal advice should be sought, changes to individual contracts may only be made with agreement.

# Section 2 - Grievance procedures

## Why have a grievance procedure?

34. In any organisation workers may have problems or concerns about their work, working environment or working relationships that they wish to raise and have addressed. A grievance procedure provides a mechanism for these to be dealt with fairly and speedily, before they develop into major problems and potentially collective disputes.

35. Whilst employers are not required by statute to have a grievance procedure it is good employment relations practice to provide workers with a reasonable and prompt opportunity to obtain redress of any grievance. Employers are statutorily required in the written statement of terms and conditions of employment to specify, by description or otherwise, a person to whom the employee can apply if they have a grievance and they are also required by statute to allow a worker to be accompanied at certain grievance hearings (see section three).

36. In circumstances where a grievance may apply to more than one person and where a trade union is recognised it may be appropriate for the problem to be resolved through collective agreements between the trade union(s) and the employer.

## Formulating procedures

37. It is in everyone's best interest to ensure that workers' grievances are dealt with quickly and fairly and at the lowest level possible within the organisation at which the matter can be resolved. Management is responsible for taking the initiative in developing grievance procedures which, if they are to be fully effective, need to be acceptable to both those they cover and those who have to operate them. It is important therefore that senior management aims to secure the involvement of workers and their representatives, including trade unions where they are recognised, and all levels of management when formulating or revising grievance procedures.

## Essential features of grievance procedures

38. Grievance procedures enable individuals to raise issues with management about their work, or about their employers', clients' or their fellow workers' actions that affect them. It is impossible to provide a comprehensive list of all the issues that might give rise to a grievance but some of the more common include: terms and conditions of employment; health and safety; relationships at work; new working practices; organisational change and equal opportunities.

39. Procedures should be simple, set down in writing and rapid in operation. They should also provide for grievance proceedings and records to be kept confidential.

40. It is good practice for individuals to be accompanied at grievance hearings (see also section three for information on the statutory right to be accompanied).

41. In order for grievance procedures to be effective it is important that all workers are made aware of them and understand them and if necessary that supervisors, managers and worker representatives are trained in their use. Wherever possible every worker should be either given a copy of the procedures or provided with access to it (eg, in the personnel handbook or on the company intranet site) and have the detail explained to them. For new employees this might best be done as part of any induction process. Special allowance should be made for individuals whose first language is not English or who have a visual impairment or some other disability.

## The procedure in operation

42. Most routine complaints and grievances are best resolved informally in discussion with the worker's immediate line manager. Dealing with grievances in this way can often lead to speedy resolution of problems and can help maintain the authority of the immediate line manager who may well be able to resolve the matter directly. Both manager and worker may find it helpful to keep a note of such an informal meeting.

43. Where the grievance cannot be resolved informally it should be dealt with under the formal grievance procedure. The number of stages contained in the procedure will depend on the size of organisation, its management structure and the resources it has available. In larger organisations the procedure might contain all the following stages, but for the smaller business the first and final stages might be sufficient :-

**First Stage:** Workers should put their grievance, preferably in writing, to their immediate line manager. Where the grievance is against the line manager the matter should be raised with a more senior manager. If the grievance is contested the manager should invite the worker to attend a hearing in order to discuss the grievance and should inform the worker of his or her statutory right to be accompanied depending on the nature of the grievance (see section three) The manager should respond in writing to the grievance within a specified time (eg, within five working days of the hearing or, where no hearing has taken place, within five working days of receiving written notice of the grievance). If it is not possible to respond within the specified

time period the worker should be given an explanation for the delay and told when a response can be expected.

**Second Stage:** If the matter is not resolved at Stage 1 the worker should be permitted to raise the matter in writing with a more senior manager. The choice of this person will depend on the organisation but could be a departmental, divisional or works' manager. The manager should arrange to hear the grievance within a specified period (eg, five working days) and should inform the worker of the statutory right to be accompanied (see section three). Following the hearing the manager should, where possible, respond to the grievance in writing within a specified period (eg, ten working days). If it is not possible to respond within the specified time period the worker should be given an explanation for the delay and told when a response can be expected.

**Final Stage:** Where the matter cannot be resolved at Stage 2 the worker should be able to raise their grievance in writing with a higher level of manager than for Stage 2. The choice of this person will depend on the organisation but could include directors or in certain cases the chief executive or managing director. Workers should be permitted to present their case at a hearing and should be informed of their statutory right to be accompanied (see section three). The manager dealing with the grievance should give a decision on the grievance within a specified period (eg, ten working days). If it is not possible to respond within the specified time period the worker should be given an explanation and told when a response can be expected.

44. In most organisations it should be possible to have at least a two stage grievance procedure. However, where there is only one stage, for instance in very small firms where there is only a single owner/manager, it is especially important that the person dealing with the grievance acts impartially.

45. In certain circumstances it may, with mutual agreement, be helpful to seek external advice and assistance during the grievance procedure. For instance where relationships have broken down an external facilitator might be able to help resolve the problem. Where the grievance is against the chief executive or managing director an external stage using some form of alternative dispute resolution might be helpful.

## Special considerations

46. Some organisations may wish to have specific procedures for handling grievances about unfair treatment eg, discrimination or bullying and harassment, as these subjects are often particularly

sensitive.

47. Organisations may also wish to consider whether they need a whistleblowing procedure in the light of the Public Interest Disclosure Act 1998. This provides strong protection to workers who raise concerns about wrongdoing (including frauds, dangers and cover-ups). While the Act reassures workers that it is safe to raise such a concern internally, it also protects disclosures to key regulatory authorities and - provided they are reasonable and made with good cause - wider disclosures.

48. Sometimes a worker may raise a grievance about the behaviour of a manager during the course of a disciplinary case. Where this happens and depending on the circumstances, it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered. Consideration might also be given to bringing in another manager to deal with the disciplinary case.

## Records

49. Records should be kept detailing the nature of the grievance raised, the employers response, any action taken and the reasons for it. These records should be kept confidential and retained in accordance with the Data Protection Act 1998 which requires the release of certain data to individuals on their request. Copies of any meeting records should be given to the individual concerned although in certain circumstances some information may be withheld, for example to protect a witness.

# Section 3 - The statutory right to be accompanied at disciplinary and grievance hearings

## What is the right?

50. **Workers have a statutory right to be accompanied by a fellow worker or trade union official[7] where they are required or invited by their employer to attend certain disciplinary or grievance hearings and when they make a reasonable request to be so accompanied.** This right is additional to any contractual rights.

## To whom does the right apply?

51. **The statutory right to be accompanied applies to all workers, not just employees working under a contract of employment. "Worker" is defined in the legislation and includes anyone who performs work personally for someone else, but is not genuinely self-employed, as well as agency workers and home workers, workers in Parliament and Crown employees other than members of the armed forces[8]. There are no exclusions for part-time or casual workers, those on short term contracts or for people who work overseas (subject to any jurisdictional rules).**

## Application of the statutory right

52. **The statutory right applies where a worker:-**

**i) is required or invited to attend a disciplinary or grievance hearing, and**

**ii) reasonably requests to be accompanied at the hearing.**

**What is a disciplinary hearing?**

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[7] See paragraph 57 for more information on who can accompany a worker at a disciplinary or grievance hearing.

[8] See Section 13 (1), (2) and (3) of the Employment Relations Act 1999 for definitions of "worker" "agency worker" and "home worker".

53. Whether a worker has a statutory right to be accompanied at a disciplinary hearing will depend on the nature of the hearing. Employers often choose to deal with disciplinary problems in the first instance by means of an informal interview or counselling session. So long as the informal interview or counselling session does not result in a formal warning or some other action it would not generally be good practice for the worker to be accompanied as matters at this informal stage are best resolved directly by the worker and manager concerned. Equally, employers should not allow an investigation into the facts surrounding a disciplinary case to extend into a disciplinary hearing. If it becomes clear during the course of the informal or investigative interview that formal disciplinary action may be needed then the interview should be terminated and a formal hearing convened at which the worker should be afforded the statutory right to be accompanied.

54. **The statutory right to be accompanied applies specifically to hearings which could result in:**

**i) the administration of a formal warning to a worker by his employer** (ie, a warning, whether about conduct or capability, that will be placed on the worker's record)**;**

**ii) the taking of some other action in respect of a worker by his employer** (eg, suspension without pay, demotion or dismissal)**; or**

**iii) the confirmation of a warning issued or some other action taken.**[9]

**What is a grievance hearing?**

55. **The statutory right to accompaniment applies only to grievance hearings which concern the performance of a "duty by an employer in relation to a worker"**[10]**. This means a legal duty arising from statute or common law** (eg, contractual commitments)**.** Ultimately, only the courts can decide what sort of grievances fall within the statutory definition but the individual circumstances of each case will always be relevant. For instance:-

i) An individual's request for a pay rise is unlikely to fall within the definition unless specifically provided for in the contract. On the other hand a grievance about equal pay

[9] See section 13(4) of the Employment Relations Act 1999

[10] See section 13(5) of the Employment Relations Act 1999

would be included as this is covered by a statutory duty imposed on employers.

ii) Grievances about the application of a grading or promotion exercise are likely to be included if they arise out of the contract but not grievances arising out of requests for new terms and conditions of employment, for instance a request for subsidised health care or travel loans where these are not already provided for in the contract.

iii) Equally an employer may be under no duty to provide car parking facilities and thus a grievance on the issue would not attract the right to be accompanied. However, if the worker was disabled and needed parking facilities in order to attend work the employer's duty of care becomes relevant and the worker is likely to have a statutory right to be accompanied.

iv) Grievance arising out of day to day friction between fellow workers may not involve the breach of a legal duty unless the friction develops into incidents of bullying or harassment which would be included as they arise out of the employer's duty of care.

**What is a reasonable request?**

56. **In order for workers to exercise their statutory right to be accompanied they must make a reasonable request to their employer**. It will be for the Courts to decide what is reasonable in all the circumstances. There is no test of reasonableness associated with the choice of companion and workers are therefore free to choose any one fellow worker or trade union official (within the limitations of paragraph 57). However, in making their choice workers should bear in mind that it would not be appropriate to insist on being accompanied by a colleague whose presence would prejudice the hearing or who might have a conflict of interest. Nor would it be sensible for a worker to request accompaniment by a colleague from a geographically remote location when someone suitably qualified was available on site. The request to be accompanied need not be in writing.

## The accompanying person

57. **A worker has a statutory right to be accompanied at a disciplinary or grievance hearing by a single companion who is either a:**

**i) Fellow worker, ie, another of the employer's workers;**

ii) **A full-time official employed by a trade union[11]; or a lay trade union official, so long as they have been reasonably certified in writing by their union as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings.** Such certification may take the form of a card or letter.

Workers may, however, have contractual rights to be accompanied by persons other than those listed above, for instance a partner, spouse or legal representative.

58. Workers are free to choose an official from any trade union to accompany them at a disciplinary or grievance hearing regardless of whether the union is recognised or not. However where a trade union is recognised in a workplace it is good practice for an official from that union to accompany the worker at a hearing.

59. There is no duty on a fellow worker or trade union official to accept a request to accompany a worker and no pressure should be brought to bear on a person if they do not wish to act as a companion.

60. Accompanying a worker at a disciplinary or grievance hearing is a serious responsibility and it is important therefore that trade unions ensure their officials are trained in the role. Even where a trade union official has experience of acting in the role there may still be a need for periodic refresher training.

61. **A worker who has been requested to accompany a colleague employed by the same employer and has agreed to do so is entitled to take a reasonable amount of paid time off to fulfil this responsibility.** The time off should not only cover the hearing but should also allow a reasonable amount of time off for the accompanying person to familiarise themselves with the case and confer with the worker before and after the hearing. **A lay trade union official is permitted to take a reasonable amount of paid time off to accompany a worker at a hearing so long as the worker is employed by the same employer.** [12]

## The statutory right in operation

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[11] As defined in sections 1 and 119 of the Trade Union and Labour Relations (Consolidation) Act 1992

[12] Time off for a lay official to accompany a worker at another employer is a matter for agreement by the parties concerned.

62. It is good practice for an employer to try to agree a mutually convenient date for the disciplinary or grievance hearing with the worker and their companion. This is to ensure that hearings do not have to be delayed or postponed at the last minute. Where the chosen companion cannot attend on the date proposed **the worker can offer an alternative time and date so long as it is reasonable and falls before the end of the period of five working days[13] beginning with the first working day after the day proposed by the employer.** In proposing an alternative date the worker should have regard to the availability of the relevant manager. For instance it would not normally be reasonable to ask for a new date for the hearing where it was known the manager was going be absent on business or on leave unless it was possible for someone else to act for the manager at the hearing. The location and timing of any alternative hearing should be convenient to both worker and employer.

63. Both the employer and worker should prepare carefully for the hearing. The employer should ensure that a suitable venue is available and that, where necessary, arrangements are made to cater for any disability the worker or their companion may have. Where English is not the worker's first language there may also be a need for translation facilities. The worker should think carefully about what is to be said at the hearing and should discuss with their chosen companion their respective roles at the meeting. Before the hearing the worker should inform the employer of the identity of their chosen companion. In certain circumstances, for instance where the chosen companion is an official of a non-recognised trade union, it might also be helpful for the employer and chosen companion to make contact with each other before the hearing.

64. **The chosen companion has a statutory right to address the hearing but no statutory right to answer questions on the worker's behalf.** Companions have an important role to play in supporting a worker and to this end should be allowed to ask questions and should, with the agreement of the employer, be allowed to participate as fully as possible in the hearing. The companion should also be permitted reasonable time to confer privately with the worker, either in the hearing room or outside.

## What if the right to be accompanied is infringed?

65. **If an employer fails to allow a worker to be accompanied at a disciplinary or grievance hearing or fails to re-arrange a hearing to a reasonable date proposed by the worker when a companion cannot attend on the date originally proposed, the worker may**

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[13] See section 13(6) of the Employment Relations Act 1999 for a definition of "working day".

**present a complaint to an employment tribunal. If the tribunal finds in favour of the worker the employer may be liable to pay compensation of up to two weeks pay as defined in statute[14].** Where the failure leads to a finding of unfair dismissal greater legal remedies might be involved.

66. Employers must be careful not to place any worker at a disadvantage for exercising or seeking to exercise their right to be accompanied as such detriment is unlawful and may lead to a claim to an employment tribunal. Equally employers must not place at a disadvantage those who act or seek to act as the accompanying person.

[14] See Chapter II of Part XIVof the Employment Rights Act 1996.