

**CODE OF PRACTICE ON DISCIPLINARY AND GRIEVANCE
PROCEDURES**

EXTRACT

RIGHT TO BE ACCOMPANIED

ADVISORY CONCILIATION AND ARBITRATION SERVICE

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Extract from 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 official⁷ 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 forces⁸. 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?

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.

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”.

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 (i.e., 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 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.

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

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

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, i.e., another of the employer's workers;
 - ii) A full-time official employed by a trade union¹¹; 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 fulfill 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

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.

The statutory right in operation

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 days¹³ 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 to 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 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 statute¹⁴. **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.

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

¹⁴ See Chapter 11 of Part XIV of the Employment Rights Act 1996.