

Guidance Note on the right to be accompanied at Disciplinary and Grievance Hearings

Since the Employment Relations Act 1999 came into force more than a decade ago, workers have benefited from a legal right to be accompanied at disciplinary and grievance hearings by a trade union representative or a fellow worker.

This right can cause difficulties for employers who remain unclear on what the “right to be accompanied” actually means, and more importantly, what rights they have when dealing with employees’ requests to be accompanied at internal disciplinary/grievance meetings.

What is the right to be accompanied?

The right to be accompanied arises when a worker is invited to attend a disciplinary or grievance hearing, and the worker “reasonably requests” to be accompanied at that hearing by a trade union representative or fellow worker. When an employer is faced with such a request, the employer must allow the worker to be accompanied.

What is a “reasonable request”?

The right to be accompanied at a disciplinary/grievance meeting only applies where a worker reasonably requests to be accompanied at the hearing. The legislation does not however address the question of when a request would not be reasonable, but the ACAS Code of Practice does provide some guidance on this and states that “it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location.”

Each request should however be dealt with on a case by case basis.

What does a disciplinary hearing actually mean?

A disciplinary hearing is a hearing that could result in a formal warning being issued to the worker; the taking of some other disciplinary action (such as suspension without pay, demotion or dismissal) or the confirmation of a warning or some other disciplinary action (as would be the case with an appeal hearing).

Does the right apply to all grievance meetings?

The right to be accompanied at a grievance meeting will only apply if the hearing “concerns the performance of a duty by an employer in relation to a worker”.

The ACAS Code suggests that this means a common law or statutory duty. To err on the side of caution it is advisable for

an employer to allow a worker to be accompanied at all grievance meetings as to refuse such a request may infringe the worker’s statutory right to be accompanied.

Do workers have the right to be accompanied at an investigatory/informal meeting?

Informal meetings and meetings merely to investigate allegations are not normally “disciplinary hearings” and therefore the worker does not have the right to be accompanied at such a meeting. If however it becomes clear during the course of an investigatory meeting that disciplinary action against a worker may be appropriate, a separate formal hearing should be arranged at which the worker will have the right to be accompanied. The investigatory meeting should not therefore turn into a disciplinary hearing.

What if the worker is disabled under the Disability Discrimination Act (DDA)?

Employers should at all times bear in mind their obligations towards disabled workers under the DDA as this Act confers obligations upon employers to make “reasonable adjustments” where premises or “working practices” put a worker at a substantial disadvantage to others. Such adjustments may well apply to all meetings held with that worker to include investigatory meetings, and the right to bring a companion to such meetings if the companion’s presence at the meeting would help overcome a substantial disadvantage caused by the disability.

A more flexible approach should also be taken when deciding what kind of companion should be allowed to accompany a disabled worker at a grievance/disciplinary hearing, e.g. a worker with a learning difficulty or long term depression may want to be accompanied at a meeting by a family member or a friend, and this should be permitted by employers in the majority of cases unless such a refusal could be justified.

Choice of companion

The companion should be someone who is either:

1. An official of a trade union whom the union has certified in writing as having appropriate experience of, or as having received training in, acting as a worker’s companion at hearings;
2. Another of the employer’s workers.

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Many employees find formal hearings to be difficult. It is recognised as good employment practice to allow employees to be accompanied perhaps on a wider basis, for example by spouses, friends, or carers. Employers will need to decide what stance they will take on this issue but where possible should be open to considering accompaniment on a wider basis. If the employee makes a request to be accompanied on a wider basis, perhaps by a family member or a friend then we suggest that the employer discusses with the employee the reason for this request before deciding whether to permit it or not.

Can a worker bring a lawyer to a disciplinary/grievance hearing?

There is no general legal right for a worker to bring a lawyer to a disciplinary or grievance hearing. However, there may be circumstances in which this would be appropriate.

Some workers may be able to establish a right to legal representation where their careers are effectively at stake. This is as a result of the Human Rights Act 1998 which confers the right upon each individual to receive a fair trial.

In a recent case a teaching assistant was held to be entitled to legal representation at a disciplinary hearing because the gravity of the allegations, if upheld, would have led to his employer reporting him to the Independent Safeguarding Authority as being unfit to work with children.

Employers should therefore be aware that if a disciplinary hearing is likely to result in the worker's career being at stake, requests made by the worker to be accompanied at the hearing by a legal representative should be carefully considered.

What is the role of the companion at the hearing and what if we get into difficulties?

The companion has a right to address the disciplinary hearing (including presenting the worker's case, summing up, and responding on the worker's behalf to any view expressed at the hearing) and to confer with the worker during the hearing.

The companion will have no right to answer questions on the worker's behalf or to act in a way that prevents the employer from expressing their case.

The ACAS code suggest that it is good practice to allow the companion to participate as fully as possible in the hearing.

We suggest that the role of the companion is made clear at the start of the hearing and that the employer intervenes in the event that the companion is attempting to act in a way which is disruptive or which is unnecessarily prolonging the hearing

or making it difficult to obtain meaningful or proper answers from the employee. If appropriate the employer can stop the meeting, explain to the employee the problems that have arisen in respect of the conduct of the companion, and adjourn the hearing for a short time to enable the employee and the companion to discuss matters. If matters are not resolved then the employer can terminate the meeting and take steps to rearrange it. We would suggest that the reasons for this are made clear to the employee and set out in writing. The employee should be invited to nominate a different companion.

What if the companion is a union representative?

Managers are sometimes nervous when they face union representatives at hearings. However, there are no special rules that apply to union representatives and their role at the hearing should be the same as if the employee was accompanied by a fellow worker. In practice, the union representative may have more experience at dealing with these sorts of hearing. However, it is the employer's duty to get to the bottom of the situation and to ask relevant questions to elicit the facts of the matter. The union representative should not impede this although naturally they will wish to ensure that the employee's viewpoint is put across. Most relationships with union representatives can be constructive.

How should employers deal with employees' requests to postpone meetings?

Workers will often seek to postpone hearings due to the non-availability of their chosen companion/union representative.

If the workers' companion is unable to attend the proposed hearing date the onus is on the employee to suggest another date, and the employer must accept the new date so long as it is reasonable to do so, and the new date is not more than five working days after the date originally proposed by the employer.

This five-day time limit may be extended by mutual agreement between the parties, and employers are advised to try and extend this time limit where it is reasonable to do so. However, if the employer feels that the employee is persistently postponing/stalling the meeting it is under no legal obligation to extend the time limit for postponement of a hearing beyond the five-working day rule.

Requests to set hearing dates by reference to the availability of a companion should be treated with caution. In some cases, union representatives may be unavailable for several weeks into the future. Where a request would cause unreasonable

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delay, the employee should be informed of this and invited to nominate a different companion.

What are the risks if an employer gets this process wrong?

The main legal risk arises in the content of an Employment Tribunal claim in the event that the employee is dismissed.

A tribunal can award compensation of up to two weeks' pay in the event that an employer has refused, or threatened to refuse to allow a worker to be accompanied or the employer has failed to reschedule a hearing following a valid request to do so.

As the ACAS Code of Practice now also suggests that workers should be given the right to be accompanied at disciplinary/grievance meetings, failure to follow the code of practice could result in the Employment Tribunal granting the employee an uplift of 25% in his/her compensation if a claim is brought through the Tribunal as a result of the grievance/disciplinary meeting.

Practical tips for employers

- Ensure that your managers appreciate the distinction between an informal meeting or an investigatory meeting and a formal disciplinary/grievance hearing as the legal right to be accompanied applies only to the latter.
- If the right to be accompanied applies to the hearing ensure that the employee is notified in advance in writing as part of the invite letter. Invite the employee to let you know in advance of the meeting the identity of the person they wish to bring along.
- Keep investigatory and disciplinary meetings separate.
- Consider your stance as a business on widening the right to be accompanied in appropriate cases
- Consider your stance on legal representatives – will your business face situations where there may be a legal entitlement?
- Consider providing training to managers on the conduct of disciplinary and grievance hearings.

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