

A CENTRAL LONDON LAW CENTRE PUBLICATION

Facing Disciplinary Action

A GUIDE FOR
EMPLOYEES AND THEIR
REPRESENTATIVES

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Introduction

This Guide is written for employees and their front-line generalist advisers, to help employees take appropriate steps when faced with disciplinary action, whether on grounds of misconduct or poor performance. Partly this is to maximise their chances of avoiding dismissal. But it is also to improve their prospects of winning any employment tribunal case for unfair dismissal or discrimination should it come to that. The best route through the Guide is to start with the Contents page (p1) or the following checklist.

Checklist

The disciplinary process

1. Employee receives letter inviting him/her to a disciplinary hearing.
2. Check whether the letter clearly sets out the allegations and that it includes copies of the evidence against the employee (witness statements; documents etc). See p5-6 for these requirements. If it does not, write asking for these (sample letter, p46).
3. Find a companion or representative to attend with the employee (p10).
4. If the companion is not available on the relevant date, request a postponement (p10).
5. If the employee is unable to attend on the specified date, write to the employer (see p17-20).
6. Prepare for the hearing: gather evidence and find any witnesses the employee needs (p12).
7. If the employee feels unable to express his/her defence fully at the hearing, put his/her points in writing (sample letter, p47).
8. Before the hearing, write asking who will be taking notes and for a copy of the notes afterwards (p15; sample letter, p47).
9. Request any needed reasonable adjustments if the employee is disabled (see p38).
10. The employee attends the hearing. Notes should be taken.
11. After the hearing, get a copy of the employer's minutes/notes to check their content is accurate. Write in with anything omitted.
12. If unhappy with the outcome, write letter of appeal within required time-limit (appeals, p7; sample letter, p48).
13. Do not miss employment tribunal time-limit (p45).

Terminology

Apart from in the dedicated discrimination sections, workers are referred to as 'employees' throughout this Guide. This is because only employees can claim unfair dismissal and are covered by the ACAS Code. Nevertheless, good practice points should cover all kinds of worker. The section on the right to be accompanied also refers to workers generally.

"Come back if you get dismissed"

Many employees seeking advice on impending disciplinary proceedings are told to come back if and when they are dismissed.

Some advice agencies may be too busy to get involved at such an early stage or on short notice. Or they may feel that dismissal is inevitable and there is nothing concrete that can be done at this point.

Wrong! There are many reasons for advisers to guide employees through the disciplinary process. And guidance usually means 'hands-on' guidance – finding out the facts, noting the key points, drafting letters, drafting crib sheets with bullet points for the employee to hand over at the hearing. Few employees are able to translate general verbal advice into effective concrete action.

Reasons to get involved at the disciplinary stage are:

- 📌 Good psychology and a persuasive argument may be able to prevent dismissal.
- 📌 Where dismissal is inevitable, the way employees present their case is crucial to the chances of success.
- 📌 Pitfalls for employees, which could be avoided, include:
 - failing to find out the allegations and evidence against them prior to the hearing so they are caught by surprise and cannot properly prepare their defence.
 - failing to put their full defence to the employer at the disciplinary and/or appeal hearings. It is too late by the time they get to the tribunal – employers are only expected to go on what they are told at the time.
 - failing to understand - and therefore put forward - legally relevant points in their defence.
 - failing to get a good note of the disciplinary hearing, so they are later unable to prove what was said to them or what they said by way of defence.
 - in discrimination cases, failing to spell out their concerns that they have been discriminated against.
 - not attending the disciplinary hearing or failing to appeal.

The ACAS code of practice on disciplinary and grievance procedures

ACAS (the Advisory, Conciliation and Arbitration Service) is an independent government-funded body. It has statutory authority to issue Codes of Practice containing practical guidance for improving industrial relations.

A revised ACAS Code on Disciplinary and Grievance Procedures came into effect on 6 April 2009. It sets out recognised standards of good industrial practice in dealing with disciplinary situations involving allegations of misconduct or poor performance. The Code should be followed in all disciplinary situations, not only dismissals.

The Code is only 10 pages long. It is available on the ACAS Website: www.acas.org.uk

It is not against the law for an employer to fail to follow recommendations in the Code, but the tribunal will take it into account when deciding whether an employee has been unfairly dismissed.

Failure by the employer or the employee to follow the Code may also affect how much compensation the employee is awarded if s/he later wins a tribunal case for unfair dismissal, discrimination, unlawful deductions or various other claims. If the claim concerns a matter to which the Code applies, and the employer unreasonably failed to comply with the Code in relation to that matter, the employee's compensation may be increased by up to 25%. Equally, if the employee unreasonably failed to comply with the Code, his/her compensation may be reduced by up to 25%. This rule is set out in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

This ACAS compensation regime replaced the statutory dispute resolution procedures which were phased out from April 2009.

Note that the Code applies to employees (as opposed to other workers). This is relevant to the compensation regime because, although only employees can claim unfair dismissal, other types of worker can make discrimination and other claims.

References to the key provisions of the Code are set out throughout this guide.

Discipline and grievances at work: the ACAS guide

ACAS has also written a 70 page non-statutory Guide to good practice. It is available on the ACAS website. The Guide sets out extracts from the Code and expands it with more suggestions.

Unlike the Code, the ACAS Guide has no legal effect. It is therefore hard to predict whether it will be referred to much in tribunal hearings. Nevertheless, ACAS has recognised status in the field of industrial relations, and its Guide sets out what is usually regarded as good practice.

It is worth knowing what the Guide says and in some circumstances, it may be useful to quote sections in correspondence with the employer.

Stages of a fair disciplinary process

The ACAS Code recommends these stages:

The investigation stage

The employer should carry out the necessary investigations to establish the facts without unreasonable delay. The employer may just collect the evidence or may hold an investigatory meeting with the employee before going to any disciplinary hearing.

Different people should carry out the investigation and the disciplinary hearing where that's practical.

Suspension

In cases where suspension is necessary, this should be kept as brief as possible and should not be used as a disciplinary sanction in itself. Suspension must be on full pay unless the contract of employment allows.

The disciplinary stage

Following the investigation, the employer should give the employee written notification that there will be a disciplinary hearing. The notification should contain:

- 📌 date, time and venue for the disciplinary hearing
- 📌 notification of the right to be accompanied to the hearing

- enough details of the alleged misconduct or poor performance to enable the employee to prepare for the hearing, usually including copies of any witness statements and other written evidence.

The disciplinary hearing should be held without unreasonable delay.

At the meeting, the employer should explain the complaint against the employee and go through the evidence which has been gathered. The employee must be allowed to:

- answer the allegations
- present evidence and call relevant witnesses
- ask questions
- bring a fellow worker or trade union representative as a companion (see p10).

Both employer and employee should give advance notice of any witnesses they intend to bring to the hearing.

After the meeting, the employer must notify the employee in writing of the outcome and any disciplinary action. If the employee is dismissed, s/he should be given the reasons for dismissal and told of the right to appeal.

The appeal stage

Employees should appeal where they feel the disciplinary action is wrong or unjust.

Appeals should be heard without unreasonable delay.

Wherever possible, appeals should be heard by a manager who has not previously been involved in the case.

Employees also have the right to be accompanied at the appeal (see p10).

Employees should be told of the appeal outcome as soon as possible.

Appeals

The ACAS Code on Disciplinary and Grievance Procedures says employers should allow employees to appeal against any formal disciplinary decision made.

If the employer refuses to allow an appeal to take place, it will almost certainly make the dismissal unfair. It is also likely to lead to an increase in the employee's compensation if s/he later wins an unfair dismissal or discrimination case in the employment tribunal.

The appeal procedure

The Code simply says appeals should be heard without unreasonable delay. They should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case. Employees have the right to be accompanied (see p10). Employees should be informed of the writing in outcome as soon as possible.

ACAS adds in its non-statutory Guide that ideally the manager who hears the appeal should be more senior than the one who heard the original hearing. But that is not always possible with small organisations. If an organisation is really tiny, maybe the owner or member of any Trustee board could hear the appeal.

The employer's own disciplinary procedure may set out procedure and time-scales. There is no general time-limit within which employees should notify their appeal, but they should not wait too long. Be careful not to miss any time-limit set out in the employer's own disciplinary procedure. ACAS says (in its non-statutory Guide) that 5 working days would usually be appropriate, though sometimes longer is needed.

If the employer unreasonably insists on a shorter time-scale which the employee cannot adhere to, eg 2 working days, the employee should at least give written notification within the 2 days of his/her intention to appeal and say that the grounds will follow shortly.

Grounds of appeal

An appeal can be a full rehearing of all the facts or simply a review of the sanction. This depends on the employee's grounds of appeal.

An employee may appeal on various grounds including:

- 📌 the evidence did not support the manager's conclusions at the original disciplinary
- 📌 new evidence has emerged
- 📌 the penalty is inconsistent with how others have been treated
- 📌 the sanction is too severe

- 📌 the disciplinary and investigation was handled in a way which was procedurally unfair
- 📌 there was unlawful discrimination in the handling of the disciplinary or failure to make reasonable adjustments to the process under disability discrimination law.

Tips for drafting an appeal letter:

- 📌 think of who will be hearing the appeal. What arguments are likely to appeal to them? How will they be thinking?
- 📌 consider what impression the letter will make. It should be polite, firm and measured, but not hostile and intemperate. Not only will that antagonise the person hearing the appeal, but it will look bad in any future employment tribunal case.
- 📌 on the other hand, the letter should not sound weak and apologetic. Some pressure may need to be applied to the decision-maker. But the pressure is applied by using persuasive arguments which the decision-maker knows would look powerful to a tribunal.
- 📌 focus on the strongest points. Don't lose sight of the wood for the trees.
- 📌 Avoid accusations that the employee was 'set up' without powerful objective evidence (which is rare).

For a sample appeal letter, see p48.

Appeal outcomes

The decision of the appeal may be to confirm the previous decision, to reduce the sanction or to overturn the decision altogether. Occasionally, the appeal may uphold the decision but change the basis on which it was made.

There is no guarantee that an appeal decision will not impose a worse sanction, eg dismissing an employee who is appealing against a final written warning but that would be extremely unusual. It would also be likely to be unfair, except in exceptional circumstances. ACAS says in its non-statutory Guide that employees must not be punished for appealing and higher penalties should not be imposed, because this may deter individuals from appealing.

Correcting earlier unfairness

A properly conducted appeal which considers the whole matter again can have the effect of correcting any unfairness at earlier stages of the disciplinary process. For example, a dismissal might be unfair because the employee was not told of all the allegations against him/her prior to the disciplinary hearing and, as a result, did not put forward his/her defence. However, if all the allegations have been clearly set out in writing prior to the appeal hearing, the employee does then get a chance at the appeal to have a fair hearing. This can turn a dismissal from one which would have been seen as unfair by an employment tribunal to one which is fair.

This can feel unjust because the employee has in effect lost the opportunity of one stage in the disciplinary process. Also, in some workplaces, senior managers tend to rubber-stamp appeals because they don't want to undermine their junior managers. But there is nothing that can be done about this situation. If a fair appeal hearing is offered, the employee must participate. Otherwise the tribunal will probably say it is the employee's fault that the original unfairness was not corrected.

What if the employee doesn't want to appeal?

The ACAS Code says employees should appeal if they feel the disciplinary action against them was wrong or unjust. There is therefore a risk in not appealing that, even if they win their unfair dismissal or discrimination case, the tribunal will reduce the award of compensation.

Nevertheless, in some circumstances, a tribunal may not reduce compensation, because it is understandable why the employee did not appeal. This is untested under the ACAS Code, but it may be understandable if the employee was unacceptably harassed during the disciplinary and the employee has reasonable fears that if s/he appeals or attends the appeal, s/he will be further harassed

In such situations, it may be a good idea for employees to put in a fully set out written appeal, even if they do not actually attend any appeal meeting.

On the other hand, if an employee has been so badly treated that s/he does not want to go back to work for that employer, it may be understandable if s/he does not appeal at all.

Ultimately it is the employee's decision whether s/he wants to appeal and whether s/he can face an appeal hearing, bearing in mind the risks of not attending.

For more comments on the risks of not appealing or attending the appeal hearing, see p17-p22.

The employee doesn't want to go back

There is a risk in appealing if the employee definitely does not want to return. If the appeal is successful and the employee refuses to accept the offer of reinstatement, there are these potential problems:

- 📌 it may be harder to win his/her unfair dismissal or discrimination case
- 📌 s/he may be awarded less compensation if s/he does win because s/he has failed to 'mitigate' ie reduce his/her financial loss by accepting the job back
- 📌 the legal position may be that the 'dismissal' no longer exists, so that s/he cannot claim unfair dismissal. The case law on this is rather unclear, but the risk can't be discounted.

Appeals against dismissal do not often succeed, particularly in the private sector, so it may be that these risks are minimal.

Tribunal time-limits

Time-limits are set out on p45. It is essential to put in the tribunal claim before the tribunal deadline even if the appeal has not yet been decided.

Representatives at the disciplinary hearing

Check the disciplinary procedure in the employee's contract. This may give employees an express right to be represented at the disciplinary hearing by a colleague, trade union representative, or – more rarely – outside friend, relative or solicitor.

Regardless of what the contract says, the law gives all workers (not just employees) a right to be accompanied by a work colleague or trade union representative under section 10 of the Employment Relations Act 1999 (see below). Section 10 does not give a right to be represented by anyone outside the organisation.

The statutory right to be accompanied

Section 10 of the Employment Relations Act 1999

Where a worker reasonably requests to be accompanied at a disciplinary hearing, the employer must allow the worker to choose a trade union representative or another of the employer's workers to accompany him/her. This right applies to all workers, not just to employees.

This companion may address the hearing and confer with the worker during the hearing. The companion may put and sum up the worker's case and may respond on the worker's behalf to any view expressed at the hearing, but s/he may not answer questions on behalf of the worker.

A disciplinary hearing means a hearing which could result in a formal warning or the taking of some other action. This could include 'informal' warnings which are put in writing and can be taken into account if further offences are committed.

A purely investigatory, as opposed to disciplinary, meeting is unlikely to be covered by this right. However, trade union members are likely to have separate rights to be represented by their trade union at investigatory meetings.

The employer must allow a worker to take time off during working hours to accompany another of the employer's workers. If the chosen person cannot attend the proposed time for the hearing, the employer must postpone the hearing to any reasonable time suggested by the worker within five working days of the original date.

A worker can complain to an employment tribunal if s/he is not allowed this statutory right to be accompanied. The tribunal can award compensation of up to two weeks' pay (subject to the upper limit applicable to statutory redundancy pay).

A worker must not be subjected to any detriment because s/he has tried to exercise this right or because s/he has accompanied another worker. Also, it would be automatically unfair dismissal to dismiss an employee for this reason.

What does the ACAS Code say?

The ACAS Code of Guidance on Disciplinary and Grievance Procedures refers to the statutory right to be accompanied at paras 13 – 16.

The statutory right is triggered when a worker asks to be accompanied. The ACAS Code goes further. At para 10, it states that employees should be advised of their right to be accompanied, when notified of a disciplinary hearing.

This means there may be a compensatory uplift of up to 25% where, eg, the employee wins a case of unfair dismissal or discriminatory disciplinary action, and the employer had not advised of the right or permitted the employee to be accompanied.

Is a companion or representative necessary?

Employees may find it hard to persuade a work colleague to come with them to the disciplinary hearing and may feel there is little point anyway in taking someone who does not have representative skills.

The best use of an unskilled companion is as a witness and a note-taker. Explain to them in advance what are the most important points and ask them to make sure they note down what the employee or the employer says on those points (see p15).

The exceptional right to legal representation

There is not normally any right to representation by outside lawyers unless such right is explicitly given in the employee's contract, which would be unusual.

A few recent cases have successfully claimed the right to legal representation using Article 6 of the European Convention on Human Rights, which gives the right to a fair hearing. Usually Article 6 does not apply to internal disciplinary hearings, but it can do so where a public sector employer's decision may lead to a professional ban, eg because of allegations of sexual misconduct against a nurse or teacher.




Useful cases to read on this are *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* [2009] IRLR 829, CA; *The Governors of X School and others v R on the application of G* [2010] EWCA 1 (Admin)

Evidence

Gathering evidence

Once notified of the allegations, the employee needs to gather any relevant documentary evidence, eg the contract of employment, past appraisals, policies, complimentary letters. S/he may need to ask the employer for copies of anything useful which s/he does not have.

The employee should also consider whether s/he wants to bring any witnesses with him/her. There are three potential problems with this:

-  **reluctant witnesses:** Witnesses who are still employed are usually reluctant to get involved as they fear for their own job. It is often a good tactic to ask them for a written statement first, and only after they have given the statement, to ask whether they agree to come with. The statement should be in their own writing, signed and dated. It's important not to put excessive pressure on someone to help once they have refused. They could complain to the employer, and the employee could be accused of harassment.
-  **irrelevant witnesses:** Witnesses are only useful if they have something relevant to say. Think carefully about what evidence a witness would be able to give. Remember that witnesses can accidentally say unhelpful things. The employer may ask them other questions at the disciplinary and they may put their foot in it. Don't ask a witness to help if they know some things which will be positively unhelpful.
-  **the employee is suspended and has been told s/he may not contact anyone.** In most cases it will be unjustifiable for employers to prevent a suspended employee contacting work colleagues as possible witnesses. Unless the employee has been suspended because of some allegation connected with how s/he treats the relevant work colleagues, it is hard to see how communication can legitimately be prohibited. The employee will need to decide whether to go ahead and contact the possible witnesses anyway or, preferably, first to write to the employer asking the reason for the prohibition and stating that it is interfering with his/her ability to put forward his/her case.

Evidence against the employee

The ACAS Code says that, when notifying the employee of the disciplinary hearing, the employer should provide copies of any witness statements and other written evidence. If these are not supplied with the letter, the employee should ask for them to be supplied in good time to prepare for the hearing (see sample letter, p46).

Surveillance evidence

What happens if the employer has gathered evidence against the employee by secret tape-recordings or electronic monitoring? This may be a breach of the Data Protection Act 1998 (the first data principle) and also a breach of the employee's right to privacy under Article 8 of the European Convention on Human Rights. However, this does not necessarily mean a dismissal based on such evidence will be unfair. That will mainly depend on whether the surveillance was 'proportionate', ie comparing the nature of the surveillance with the type of offence, whether evidence could have been obtained in a less intrusive way, and what the surveillance revealed.

In the case of *McGowan v Scottish Water* [2005] IRLR 167, the employer engaged private investigators to undertake covert surveillance of the employee's home because they (correctly) suspected him of falsifying his time-sheets. The EAT said the tribunal was entitled to decide that the secret surveillance did not breach Article 8 in a way which would make the dismissal unfair. This was because the surveillance was proportionate – the investigators only filmed Mr McGowan's comings and goings which went to the heart of the matter; the filming was from over the road and therefore recorded what could have been observed by any member of the public using the road; there was no other way to check up on him; the subsequent disciplinary process was fair; they were investigating effectively a criminal matter; and the employer's suspicions were proved. Although normally employees should be warned that covert surveillance may occur, this was an exceptional circumstance, as it would have defeated the purpose of the surveillance to forewarn Mr McGowan.

McGowan is an extreme case, but it shows circumstances whereby a tribunal may consider the use of secret recordings of an employee's home to be permissible. An employer might not need such a high level justification to use evidence obtained by covert surveillance at work, especially if employees have been warned it may occur.

The Data Protection Code (available on the Information Commissioner's website at http://www.privacydataprotection.co.uk/pdf/employment_code_of_practice.pdf) gives guidance on monitoring at work. The Code is only guidance, not the law. Part 3 of the Code says that covert monitoring should only really be used if criminal activity or equivalent malpractice is suspected.

Anonymous evidence

Employers need to be very careful about relying on evidence from witnesses who want to remain anonymous, whether they are external witnesses or fellow employees. If employers do rely on such evidence, ACAS recommends in its non-statutory Guide that they seek corroborative evidence. It is also important that:

- 📌 a full statement is taken and shown to the employee;
- 📌 the hearing officer interviews the informant and takes careful notes;
- 📌 the employer considers whether the informant has any reason to fabricate information against the employee.

See *Linfood Cash & Carry Ltd v Thomson and another* [1989] IRLR 235, EAT for full guidelines

If the employer proposes to rely on anonymous witness evidence, the employee should therefore write:

- 📌 objecting in principle on grounds that it is against natural justice and does not enable the employee fully to defend him/herself against the evidence.
- 📌 asking why the witness wishes to remain anonymous, so that the employee has the chance to make any comments on that.
- 📌 asking to see a full written statement from the witness, verified by HR.
- 📌 asking the employer to consider whether the witness would have any reason to fabricate the evidence.

The disciplinary hearing

Employees should make every effort to attend the disciplinary and appeal hearings (see p17).

Employees have the right to be accompanied to the disciplinary hearing and the appeal (see p10). ACAS says in its non-statutory Guide that the accompanying person may also ask questions and should be able to confer privately with the employee.

Procedure at the disciplinary hearing

There are no rules as to precisely how a disciplinary hearing should be conducted, although some large employers may have a written procedure. The ACAS Code sets out these guidelines:

‘At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.’

Small employers tend to hold small informal disciplinary hearings, sometimes with only the line manager, employee and employee’s representative present. There may or may not also be a minute-taker or someone from personnel. The employee will be shown witness statements, but the employer may not bring the witnesses against the employee to the hearing.

Larger public-sector employers may have a more formal court room style procedure, with a single decision-maker or disciplinary panel, and witnesses called upon to give evidence and be cross-examined.

Employers should make any reasonable adjustments needed because of an employee's disability (see p38) or arrange for an interpreter if the employee is not speaking in his/her first language.

Bias

The person designated to conduct the disciplinary needs to be impartial. ACAS recommends that the person hearing the disciplinary is someone different from whoever conducted the preliminary investigation, although that is not always possible with a small employer. Also, the person who hears the appeal should not have been involved in the earlier disciplinary stages. If necessary with small employers, the owner of the organisation or member of any management committee should hear the appeal. Nevertheless, it will not necessarily be unfair dismissal if there is not this strict separation of personnel. What counts is the overall fairness of the process.

Is there a right to cross-examine witnesses?

The employer may choose to bring witnesses to the disciplinary hearing or may just bring written statements instead. Some disciplinary procedures give employees the right to cross-examine witnesses against them at disciplinary hearings. Otherwise, it all depends on the facts whether an employer can act reasonably without allowing the employee to cross-examine witnesses against him/her. It is always important that employees should know the evidence against them but it may be enough if they have been shown witness statements. (See *Santamera v Express Cargo Forwarding t/a IEC Ltd* [2003] IRLR 273, EAT clarifying *Ulsterbus Ltd v Henderson* [1989] IRLR 251, NICA.)

Where the allegations are very serious and could affect an employee's future career, s/he is more likely to have the right to cross-examine witnesses by reason of Article 6 of the European Convention on Human Rights. (See *The Governors of X School and others v R on the application of G* [2010] EWCA 1 (Admin).)

Minutes / Notes of the hearing

It is important that there is an accurate and full record of the hearing. If the employer has a minute-taker, establish in advance that the employee will be given a copy of the minutes immediately after the hearing so that their accuracy can be agreed while memories are fresh. If the employee did not obtain agreement to this in advance, ask afterwards anyway. A tribunal would expect such a request to be agreed to.

If the employee is given written minutes to check, s/he must be careful to check carefully and ensure everything is noted before indicating s/he agrees it is an accurate note. There are often disputes in the employment tribunal about what was said at a disciplinary hearing. The tribunal will almost certainly assume the written note is more accurate than anyone's memory months later – particularly if it was signed by the employee at the time.

During the hearing, the employee should ask his/her representative to take notes, at least of the key points, ie the employer's explanation of the allegations; any key evidence mentioned by the employer; any

concessions made by the employer or occasions when the employer is unable to give an example or answer a question from the employee; any unacceptable comment by the employer which indicates hostility or bias or intimidation; the employee's key explanations; any mention by the employee of discrimination.

Alternatively, the employee can ask in advance to be permitted to tape record the hearing, on the basis that the employer will also be given a copy. Some employers agree to this, though many refuse. Remember that a recorded meeting is a two-edged sword. The employee may not necessarily come across very well and the employer will be on best behaviour. Recordings are often incomprehensible with bad sound quality and unclear communication (listening to words alone can be misleading without seeing the speakers). Also, if the employee does produce a recording to be used at the tribunal hearing, s/he probably will be required to type it up and let the employer listen to the tape. This can be time-consuming and expensive.

Secret recordings are not a good idea. Although the tribunal will probably allow them to be used at any later tribunal hearing, they do not make a good impression. Also, if the employer finds out, the employee could probably be fairly dismissed for that reason.

Overlapping grievance and disciplinary cases

Disciplinary and grievance processes are usually separate matters. If the employee is upset about disciplinary action taken against him/her, the appropriate route is to appeal rather than to take out a grievance. But sometimes the employee feels the bringing of the disciplinary action is itself part of a wider problem whereby s/he has been treated unfairly, and that the wider issue needs to be considered before the narrow disciplinary can be fairly held. This is most likely to occur in discrimination cases.

The ACAS Code simply says that where an employee raises a grievance during a disciplinary process, that process 'may' be temporarily suspended in order to deal with the grievance. Alternatively, where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

Although the Code does not say this, in a discrimination situation it is even arguable that the grievance should be heard first.

Some written disciplinary procedures explicitly address this possibility and say what should happen if the employee raises a grievance after disciplinary action has been initiated. Many such procedures say that the disciplinary will be heard first, or even that the grievance will not be heard at all. In some circumstances this will be unfair, especially in the light of the guidance in the ACAS Code.

The difficulty is that grievances do not naturally have a place in the middle of a disciplinary procedure. Otherwise it would be too easy to disrupt the disciplinary process. The forum for any complaints by the employee about whether the disciplinary is justified should usually be the disciplinary process itself. There clearly needs to be a wider issue to support a grievance eg, as already stated, an allegation of several discriminatory actions (not purely discrimination in the disciplinary matter).

ACAS says in its non-statutory Guide that when an employee raises a grievance during the disciplinary meeting, it may sometimes be appropriate to stop the meeting and suspend the disciplinary procedure, eg

where the grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have, where bias is alleged in the conduct of the disciplinary meeting or where there is possible discrimination.

Getting upset

Many find it hard not to get upset during a disciplinary hearing, and if the employee becomes very distressed, s/he could ask for a brief adjournment. However, it is important that employees don't lose their temper. It will not look good to any employment tribunal hearing the case later and is more likely to lead to a dismissal.

Not attending the disciplinary hearing

Usually a mistake

For various reasons, employees may be tempted not to attend the disciplinary hearing. This is almost always a mistake. As explained below, the hearing can go ahead in the employee's absence and a dismissal will not necessarily be unfair. These are the dangers of not attending:

The employee is more likely to be dismissed

The employer will get annoyed and is probably more likely to discipline or dismiss the employee.

An employee is less likely to win his/her unfair dismissal case

The ACAS Code says that where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the employer should make a decision on the evidence available.

An employment tribunal will not necessarily say it is unfair to dismiss an employee in his/her absence.

The employee will also lose the opportunity to put forward his/her defence. The employee may put forward strong evidence in his/her defence to the employment tribunal, but if s/he did not put it to the employer at the time, it won't help. The tribunal will say:

'The employer gave you a chance to attend and say all this. It's not the employer's fault you didn't attend. The employer's decision was reasonable on the evidence it had at the time.'

Of course it is a different matter if it is in some way the employer's fault that the employee did not put forward his/her whole defence.

The employee is likely to get less compensation even if s/he does win

A tribunal can make a percentage reduction in compensation for contributory fault or because the employee has not followed procedures recommended by the ACAS Code (see p44).

What factors might make it unfair to dismiss an employee in his/her absence?

It is more likely to be unfair if

- 📌 the employee has a good reason for not attending
- 📌 the employee informed the employer in advance that s/he won't be coming and why
- 📌 the employee has indicated a willingness to attend on another day, not too far into the future
- 📌 the employer does not reschedule the meeting at least once and warn the employee that s/he will be dismissed if s/he doesn't attend a second time
- 📌 the employer does not fairly consider all the evidence, even though the employee isn't there.

It is particularly risky for an employee not to attend if s/he

- 📌 has a record of not attending such meetings
- 📌 has a bad disciplinary record, or
- 📌 the offence which s/he is accused of concerns some form of non-attendance or lack of cooperation, eg unauthorised absence or lateness.

What is contributory fault?

Under section 123(6) of the Employment Rights Act 1996, a tribunal must reduce an employee's compensation for unfair dismissal if it decides the dismissal was to any extent caused or contributed to by any action of the employee. This could include not putting forward his/her whole defence at the time, eg by failing to attend the disciplinary or appeal hearing.

What does the ACAS Code say?

Failure to follow a relevant part of the ACAS Code on Disciplinary and Grievance Procedures can lead to a reduction in compensation of up to 25% (see p4). The Code says that employees (as well as employers) should

- 📌 make every effort to attend the disciplinary meeting
- 📌 deal with matters promptly and not unreasonably delay meetings

Requesting postponement

Reasons why employees don't want to attend

Different reasons and sample letters are set out below. If an employee does request a postponement, it is better to do so in writing than in a phonecall. It can be hard to prove what was said in a phonecall. Also, it is easier for employers to ignore a request which is only made verbally. If a phonecall is made, whether or not backed up by a letter, the employee should always make a note of what was said, who was spoken to, the date and time. This will be evidence at any tribunal hearing.

It is a matter of tactics whether the employee simply announces s/he cannot attend the original date and suggests a new date is fixed, or whether s/he requests a postponement. The risk of making a request is that the employer may say no or just fail to answer before the fixed date. The advantage of making a request, if the employer agrees it, is that there is no suggestion that the employee has failed to attend without permission.

The employee hasn't yet found a representative

Under the Employment Relations Act 1999 and possibly under the employee's own contract, s/he does have the right to be accompanied and has the right to have the date of the disciplinary postponed to any reasonable time which s/he suggests within five working days if the chosen representative is unavailable (see p10). The employer cannot just insist that the employee chooses someone else.

However, if a delay longer than 5 days is required to get the chosen representative, the statutory right is lost and it may not be unfair to dismiss just because the employer refused to wait that long. Relevant factors would be: why that particular representative is needed, the availability of alternative adequate representatives, how much further delay is required, the nature of the offence and any reasons why delay may make a fair hearing more difficult. It helps to make a concrete suggestion of an alternative date.

Sample letter to postpone within 5 working days:

I am writing to inform you that I cannot attend the disciplinary hearing on 3 July because my representative is unavailable. Could you please refix the hearing for 8 July. I understand that I am entitled to have a postponement to any reasonable time within 5 working days if my representative is unavailable. *(This second sentence is a little legalistic and may upset the employer: therefore it is advised only if the employee suspects the employer will otherwise refuse.)*

Sample letter to postpone beyond 5 working days:

I am writing to request that the disciplinary hearing fixed for 3 July is postponed to 11 July or if you prefer, any later date which we can agree. Unfortunately my chosen representative is not available on 3 July or at any time prior to 11 July and I cannot find anyone else who is suitable. I feel I will be at a disadvantage if I can't bring a representative with me and I want to be able to fully explain my case.

The employee is waiting for a legal appointment

The employee may not be ready because s/he is waiting for an appointment s/he has made to see a CAB, law centre or solicitor. It would usually be unfair not to delay the hearing until s/he has taken legal advice if s/he wants to, provided s/he made an appointment as soon as s/he could and the delay is not too long.

The employee was given very short notification of the hearing date

The ACAS Code says employees should be allowed reasonable time to prepare their case, although the disciplinary meeting should be held without unreasonable delay. ACAS does not say how much time would be reasonable. That depends on the nature of the allegations and the kind of preparation which the employee needs to do. It is highly unlikely that less than 2 working days would be reasonable and in many cases, longer notice would be reasonable.

If the employee needs a postponement of a disciplinary hearing fixed in the very near future, there will be no time to send a letter. S/he should therefore either send an e-mail or hand-deliver a letter. Ideally s/he would also telephone the relevant manager or, preferably HR, to explain (making his/her own note of the call). But s/he must also put something in writing to the employer.

Sample letter or e-mail

I confirm my telephone conversation with HR today. I am afraid I will be unable to attend tomorrow's disciplinary because I have not yet had a chance to prepare. I only received notification of the date and details of the allegations yesterday. I am happy to attend any future date on 3 days' notice. I look forward to hearing from you with a new date.

The employee has been inadequately informed of the charges and case against him/her

The ACAS Code says that employees must be given sufficient information about the alleged problem to be able to prepare for the disciplinary hearing. It would normally be appropriate to include copies of any written evidence, eg witness statements with the notification of the hearing.

It would therefore usually be reasonable for an employee to request a postponement where this information has not been supplied, though as long as the employer provides the key information, the fact that some clarification has been withheld may not be enough to justify the employee not attending the disciplinary.

Sample letter

I regret that I will be unable to attend the disciplinary hearing fixed for 3 July because your letter to me does not fully clarify the matters I have been accused of. Also, you have not attached copies of the statements you took from my colleagues. Could you please now supply this information, as I need it to fully prepare to answer your concerns. I will be happy to attend a new date for the disciplinary to be fixed no sooner than 2 working days after you supply me with this information.

If the employer fixes a new hearing date but still does not provide clarification of the charges or copies of the evidence, the employee needs to decide whether or not to attend the new date. It is not a good idea to get into a prolonged stand-off. Ultimately it is better to attend, after perhaps one more chaser letter (letters are better than verbal conversations) and the point can be made to the tribunal in any later unfair dismissal case.

The employee feels it is pointless

The employee may feel the outcome is pre-determined and the hearing will be a charade. S/he may be right, but s/he should still attend. It will be extremely hard to later prove to a tribunal that the employer did not have an open mind, and the effect of not attending is to make it easier for the employer to prove the dismissal was fair.

The employee feels a different person should conduct the disciplinary

In some cases, the person designated to conduct the disciplinary may not be impartial. As explained on p15, the law on this is not clear-cut and it is dangerous to refuse to attend a disciplinary purely for this reason, as a tribunal may later say the employee was wrong. The employee can write asking for a different manager to hear the disciplinary, but should still attend if the employer refuses. S/he can then draw the letter to the attention of the tribunal in any later case. It is possible that the employer will accede to the request, but that the outcome will be the same. The employee therefore needs to decide whether s/he is unnecessarily upsetting the original manager, if there is no realistic prospect of a different outcome.

Sample letter

I am writing with regard to my disciplinary hearing on 10 March. I am concerned that Mr Stevens will be conducting the hearing and making the decision. I feel he has already made up his mind about me because he was involved in the initial investigation against me and he made comments during the investigation meeting such as (*quote hostile comments indicating manager has already decided*).

The employee can't face it

Quite understandably, employees sometimes want to put off the moment when they will be dismissed. But avoiding a disciplinary usually just prolongs the agony. If employees plan to bring an unfair dismissal or discrimination case, they need to attend the disciplinary, put forward their best defence and then decide on their next steps.

The employee is ill, stressed or depressed

An employee should not have to attend a disciplinary if s/he is genuinely ill, but if s/he remains off sick for a long period, eventually an employer will be entitled to hold the disciplinary in his/her absence.

In such cases, it is advisable for a employee to ask his/her GP whether s/he is fit to attend a disciplinary (which is not necessarily the same thing as whether s/he is fit to attend work). If not, a note from the GP would be very useful. It is also useful to give an employer some idea as to when the employee will be able to attend, rather than leaving things uncertain.

If the employee is unable to attend or needs more preparation time due to a disability, s/he can seek adjustments under disability discrimination law (see p38).

Failing to appeal

Employees sometimes do not want to appeal against their dismissal, because they feel it is pointless, they can't face going through another hearing or they no longer want their job back.

If the employee is planning on legal action, it is risky not to appeal. It may affect whether an employee wins his/her unfair dismissal case or, more probably, how much compensation s/he gets if s/he does win.

The ACAS Code says that where employees feel that disciplinary action taken against them is wrong or unjust, they should appeal against the decision. There could be a reduction in compensation for failure to follow that recommendation in the Code.



See p9 regarding the risks of appealing if the employee does not want to go back.

Resigning


Some employees prefer to resign rather than go through disciplinary action. That is fine as long as the employee does not want financial compensation. If the employee plans to bring a tribunal claim, it is extremely risky to resign and almost always a bad idea.

Employees can resign and claim constructive unfair dismissal if their employer commits a fundamental breach of their contract. This can be a breach of a concrete contract term, eg the employee's contractual hours, pay or disciplinary procedure, or a breach of the implied term of trust and confidence.

Constructive dismissal cases are very hard to win for a number of reasons. In a disciplinary context, they are particularly hard to prove. Theoretically, an employee may resign because

-  **the charges should never have been brought.** It is very hard to prove that the employer has fundamentally broken trust and confidence simply by bringing charges. Less evidence is needed for an employer to justify an investigation and calling a disciplinary than for an employer to justify finding an employee guilty and issuing a sanction.
-  **the sanction is unwarranted.** Obviously this only applies where the employer uses a sanction short of dismissal. It is not a fundamental breach of trust and confidence to take disciplinary action, just because the employee feels it is unfair or unwarranted. The employer must have issued a level of warning which is completely unsupported by the evidence on any view, or out of all proportion to the offence. Again, this is very hard to prove.

It could be a fundamental breach of contract to suspend the employee without pay or to demote him/her as a disciplinary sanction, provided the contract does not allow such action. Even then, remember that a constructive dismissal is not necessarily an unfair one. It may be fair to demote an employee if the only alternative was dismissal.

 **the employer has handled the process in a way which destroys trust and confidence**, for example, not making the employee aware of the charges against him /her; refusing to let the employee call relevant witnesses; not holding a disciplinary hearing; calling in the police without forewarning the employee and/or when it is unnecessary; unnecessarily suspending the employee. NB: All these examples will depend on the facts and may not be serious enough to amount to a fundamental breach of trust and confidence at all.

Remember: If the employee resigns and a tribunal later decides the employer did not fundamentally break the contract, the employee will be unable to claim unfair dismissal.

Resigning and discrimination

The concept of constructive dismissal exists in most of the discrimination legislation. Another way of running a claim is to say that the employer's actions which led to the worker's resignation were acts of discrimination in themselves. It can be hard to prove the disciplinary process is discriminatory and this makes it difficult to know when to resign. For example:

- Resigning just because the employer brought disciplinary charges is risky because it is harder to prove the bringing of charges is discriminatory than upholding them and issuing a disciplinary sanction. The problem is that an employer would naturally bring charges (against anyone) on less evidence than would be required to issue a disciplinary penalty.
- It is usually the issuing of a disciplinary warning which is most obviously the point at which discrimination occurs. But resigning at that stage seems premature if an appeal option is available.
- Resigning following a rejected appeal against a warning is risky because it is hard to prove the decision to reject the appeal was taken for discriminatory reasons as opposed to a common tendency of appeals officers to back junior management's disciplinary decisions.

These can all lead to complicated technical arguments regarding evidence which cannot fully be addressed in this Guide. For more detail of discrimination in disciplinary action, see p34.

Disciplinary action

The stages

Disciplinary action for most disciplinary offences usually goes through these stages:

- 📌 verbal warning
- 📌 first written warning
- 📌 final written warning
- 📌 dismissal

In some circumstances, if the offence is serious enough, the employer can skip a stage.

The ACAS Code says an employer can go directly to a final written warning if the employee's actions have had, or are liable to have, a serious or harmful effect on the organisation.

Also, some actions are so serious in themselves, that the employer is entitled to dismiss for a first offence without any previous warnings. (See p27 regarding gross misconduct.)

The ACAS Code says a warning should set out the nature of the misconduct or poor performance and the improvement required (with timescale).

Expired warnings

Previous live warnings can be taken into account in a decision to dismiss, even if they concern different offences, although this may affect how much significance should be attributed to them.

It is good practice for warnings to be disregarded for disciplinary purposes after a specified period, eg 6 months for a first written warning or 12 months for a final written warning. These periods are suggested in ACAS's non-statutory Guide, but are no longer in the ACAS Code. It is therefore up to the employer whether to specify an expiry date and after how long. Check the employee's contractual disciplinary procedure.

Employers should not normally rely on warnings which have lapsed after a specified time under their disciplinary procedure, but there are exceptions. For example, if the employee keeps on committing repeat offences a few weeks after a previous warning has lapsed. Or if an offence warrants dismissal in itself, but the employer would be more lenient if the employee had a clean record.

Poor performance

Some employers have 'capability procedures' to deal with poor performance. Whether the procedure is labelled 'capability' or 'disciplinary', the principles are the same.

As with misconduct dismissals, the ACAS Code envisages that in most cases, employees will be given at least two warnings before they are dismissed for poor performance.

It is not always necessary to give two formal warnings. One warning may do, where the employee is already fully aware of management concerns.

The employee should be given a reasonable opportunity to improve. There is no rule as to how long this should be. This depends on a number of factors, eg the written procedure, the employee's length of service, whether s/he has recently taken on new tasks, the nature of the problem.

Once the employee has been given a fixed period to improve, it is likely to be unfair to dismiss him/her before the end of that period, unless there is a very good reason.

In rare cases, where the employee has committed an act of gross negligence with potentially devastating consequences, an employer can dismiss for a first act of incompetence without having given any previous warnings. The obvious example is a commercial pilot who crashes a plane.

Management should monitor the employee's progress through the period for improvement so that they are aware of any progress which has been made. If the employee does make some progress, s/he should be given further opportunities to improve.

During the improvement period, management should offer the necessary training, supervision and support. This is especially important if the employee has been failing on relatively new duties or a recent promotion.

At the end of the improvement period, the employer should objectively measure whether the employee has improved, not simply rely on impressions and anecdotal evidence.

Probation

Most employees on probation do not build up 1 year's service, so have little protection against unfair dismissal (though they would be eligible to claim discrimination if that applied).

Where an employee has got 1 year's service, eg because a probationary period has been imposed on transfer within an organisation, the usual principles regarding performance dismissals apply. Tribunals would expect additional levels of advice, support and training and it is particularly important that employers maintain regular appraisal of probationers through the probationary period.

Gross misconduct

What is gross misconduct?

Particularly serious offences are known as 'gross misconduct'.

Employers tend to use the phrase 'gross misconduct' very readily and this should not be automatically accepted as correct. Nevertheless, certain types of misconduct would obviously fall under this category, eg theft, sexual harassment or physical violence. Other examples are likely to be falsification of records, serious bullying or harassment, deliberate damage to property, serious insubordination, bringing the employer into serious disrepute, serious infringement of health and safety rules and serious negligence which causes or may cause loss or damage.

The disciplinary procedure applicable to the employee will probably list examples of what the employer considers gross misconduct, although this is unlikely to be an exhaustive list.

What is the effect of gross misconduct?

Unfair dismissal

Gross misconduct (if proved) usually means the employee can be fairly dismissed for a first offence.

Fair procedures in the investigation and disciplinary should be followed in the normal way, although compensation for unfair dismissal is likely to be reduced if the employee wins only because the employer has followed poor procedures.

Notice

Gross misconduct also means the employer can dismiss without giving notice or pay in lieu. This is called 'summary dismissal'.

Factors which may legitimately affect the level of disciplinary action taken

Overall, an employer must act reasonably in all the circumstances in deciding what disciplinary sanction to apply. The ACAS Code does not give much help as to what factors may legitimately lead to a decision to dismiss, apart from mentioning the employee's prior disciplinary record. However, ACAS does expand in its non-statutory Guide, suggesting the following factors should be taken into account by employers when deciding on the appropriate penalty:

- 📌 the employee's disciplinary record, especially live warnings (see p25)
- 📌 the employee's general work record and length of service
- 📌 the employee's job
- 📌 what the employer's disciplinary rules say
- 📌 the penalty applied to similar offences by other employees in the past
- 📌 whether any training or support would be more appropriate
- 📌 mitigating factors, eg domestic or health circumstances; provocation.

Consistency

Employers should generally be consistent in how they treat disciplinary offences. Inconsistency can make a dismissal unfair and can be an indicator of discrimination. It is therefore worth pointing out any inconsistency to the employer at any disciplinary or appeal hearing. However, the employee needs to be aware that tribunals do not expect employers to rigidly treat everyone the same way. There can be legitimate reasons for employers to treat one employee differently from another in respect of the same offence, eg

- one employee has a cleaner disciplinary record
- one employee has received prior training and guidance; the other has not
- one employee has mitigating circumstances such as health or domestic problems
- the offences were committed at different times, and since the first offence, the employer has let everyone know that the rules have been tightened up
- one employee showed a very positive attitude when upbraided; the other did not
- the employer did not know the other employee had committed the same offence (or it cannot be proved that the employer knew).

Rigid rules and employers' policies

As already mentioned, it is important for employers to be generally consistent so as to avoid unfairness or discrimination. Employees are entitled to know in advance what the rules and policies are, and how seriously breach of any particular rule will be taken. Employees should also be informed if the employer decides to tighten up on rules which have previously been operated in a lax way.

On the other hand, employers should not be too rigid in their application of policies. An employer should look at all the circumstances, not just whether or not a rule has been broken. For example, an employee should not be automatically dismissed as soon as s/he reaches the dismissal trigger point in a sickness absence policy: the employer should still consider all the circumstances – the reasons for absence, prognosis, overall sickness record, difficulty of cover etc.

Relevant points for the employee to make

The band of reasonable responses

When deciding whether a dismissal is unfair, the tribunal must consider whether it is within the band of reasonable responses, ie is the decision to dismiss one which a reasonable employer could take, even though other employers may have been more lenient.

This means it is not enough for an employee to say to the employer:

'I understand why you might dismiss me for this. But some employers might choose to give me a second chance'.

Instead, the employee has to say, in effect:

'Taking account of all the circumstances, no reasonable employer would go as far as dismissing me'.

Show a cooperative attitude

An employer is more likely to dismiss an employee who has a generally negative or obstructive attitude, and such dismissal is more likely to be fair. Refusal to admit you have done anything wrong or to accept you ought to do anything different in the future is usually a bad tactic.

For example, in one case a nurse was dismissed for drinking on duty. He said it was unfair because colleagues doing the same thing had not been dismissed. The Court of Appeal said:

‘An employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely.’

Paul v East Surrey District Health Authority [1995] IRLR 305

Obviously the employee needs to be careful. There is no guarantee that admitting actions and showing repentance will avoid dismissal or make it unfair. Moreover, an employee should not admit anything which is a criminal offence without taking specialist advice from a criminal lawyer.

Highlight management mistakes – if appropriate

Employees who have been accused of poor performance and sometimes misconduct, often feel aggrieved that their own supervisor or line manager has been bad at their job or ‘got away with things’. This is not legally relevant. Making irrelevant allegations criticising management will just annoy the person deciding the disciplinary and make a bad impression on any later employment tribunal.

On the other hand, it is very useful to highlight any mistakes made by management which are directly relevant to the alleged offence or led to it. For example:

- 📌 in one case, an employee was dismissed for getting into a verbal fight with his supervisor, when passing on the manager’s instruction that the supervisor must work a late shift so the employee could leave for a medical appointment. The employee had asked the manager to speak to the supervisor himself, as he had foreseen the supervisor would be unhappy about it, but the manager had told the employee to deal with it.
- 📌 in another case, an employee was unfairly dismissed for printing 7000 copies of a book without checking the customer had put the sections in the right order. Although it was not his job, the supervisor happened to have been informed in advance by a deliveryman who had incidentally spotted the error. However, the supervisor had not forewarned the employee.

The following example illustrates the difference between an irrelevant allegation against a manager and a relevant one:

- 📌 An employee is called to a disciplinary hearing for letting the telephone go unanswered in the morning. When facing disciplinary action, she complains that her manager is always late and shouldn’t be so quick to throw accusations at others. This is irrelevant. However, if the manager’s job was to assist with a busy telephone, and the manager was not there on time to help out, then this would be relevant.

Management policies and procedures

Where the employee is accused of not following a management policy or procedure, it would be relevant to point out (only if applicable):

- 📌 the employee was unaware of the policy, because it is not in writing or was never drawn to his/her attention
- 📌 it is permitted practice in the workplace to depart from the policy and line management know that
- 📌 the policy is unworkable in practice and (ideally) this has been pointed out previously. (On the whole, however, it is better not to challenge a policy.)
- 📌 although there is a policy, the employer should not apply it rigidly and should look at all the circumstances of the employee's individual situation.

In some cases, it is unclear whether the employer is accusing the employee of negligence or of deliberate failure to follow particular policies and procedures, or dishonesty. It is important to know the nature of the allegation prior to the disciplinary hearing because it affects the kind of evidence the employee needs as a defence.

Sample letter

I am writing to request clarification in advance of my disciplinary hearing on 25 January. Could you please explain whether you are suggesting that I stole the missing £9.50 or whether you are simply saying that the money got lost as a result of my not following the proper cashing-up procedures? Also, if you are saying the latter, are you saying that I deliberately did not follow the procedure or that I made a mistake? Could you please let me have written clarification at least 2 days before the hearing so I can prepare my case appropriately.

Regarding the cashing-up procedure, you say that I did not get a 3rd signatory on the reconciliation sheet. However, I was unaware that two signatories were not sufficient. Could you please tell me when the rule changed and where it is written down?

Misconduct

In unfair dismissal cases, an employer does not need to prove that the employee actually committed the misconduct. Under the well-known case of *British Home Stores v Burchell* ([1978] IRLR 379), it is enough that

- (1) the employer genuinely believed the employee was guilty of the alleged misconduct;

- (2) the employer held that belief on reasonable grounds;
- (3) the employer carried out a proper and adequate investigation.

The employer does not have to carry out every investigation imaginable. It is not like a criminal case. But the employer must be reasonable.

This means that, during the disciplinary, the employee should

- 📌 ask for any matters to be investigated which appear to have been overlooked.
- 📌 fully participate and put forward his/her defence.
- 📌 point out if there is insufficient evidence for any reasonable employer to reach the conclusion that the employee was guilty of the alleged misconduct.

Other relevant points to make (depending on the nature of the misconduct) may be:

- 📌 long service with a clean disciplinary record.
- 📌 any management mistake which led directly to the misconduct.
- 📌 normal workplace standards of behaviour.
- 📌 whether the employer has previously made it clear that this type of misconduct is dismissable.
- 📌 any mitigating factors, eg stress, ill-health, domestic problems.
- 📌 others have been allowed to commit the same offence or have done so with lesser penalties (though see p28 regarding consistency).

Criminal charges

There can be problems where criminal proceedings are pending in respect of the conduct for which the employee was dismissed. Employers do not have to await the outcome of the criminal trial before investigating or deciding to dismiss, unless perhaps the trial is imminent.

The employee has to decide whether to answer any questions in the internal disciplinary, as this may prejudice the criminal hearing. However, if the employee does not want to get involved, s/he may still be fairly dismissed in his/her absence, if the employer has enough evidence to go on. The employee should get advice from his/her criminal lawyer.

Employers must conduct the internal disciplinary themselves, not allow the police to do so.

Poor performance

A positive tone

In most cases, the employee should sound positive, accepting any valid criticisms and showing a desire to improve. The employee should indicate where s/he needs any support or training.

While maintaining a positive tone, the employee should draw attention to his/her good qualities and challenge any unjustified criticisms as suggested below.

Possible points to make in the employee's defence

Remind the employer of the employee's long service with good performance overall – or until recently.

Where the employer makes broad generalised criticisms, ask for specific examples.

Put forward any explanations which show the employer's examples of poor performance are unfair.

Point out if the employer has not objectively measured the employee's performance, eg where a manager has provided selective examples of poor performance from his/her own memory, or has not properly investigated.

Highlight where any criticisms were of small matters which could not have led to serious consequences. Nevertheless accept the criticism and agree to endeavour to eliminate the problem in the future.

Provide evidence of overall good performance, eg good feed-back from customers; high performance against targets.

Point out any recent praise from the employer, eg good appraisals or bonuses.

Show that other people performed at the same level or made similar 'mistakes' without criticism (though see p28 regarding consistency).

Point out where any incompetence or performance shortfalls are caused or contributed to by management practice, mistakes, or failure to set guidelines or to explain policies.

If there have been previous warnings, point out any improvement and/or if insufficient time was given to improve. Point out any lack of support or training.

Put forward any mitigating factors, in or outside work, eg understaffing, excess workload, bullying, health difficulties, domestic problems. Or show where the difficulties may have arisen because the member has recently been given new duties and/or received inadequate training.

Discrimination

Discrimination law: protected characteristics

It is unlawful for an employer to discriminate against employees or other workers because of their race, nationality, religion, sex, sexual orientation, gender reassignment, pregnancy, disability or age.

Direct discrimination

Direct discrimination occurs where the employer treats a worker less favourably for one of these reasons. For example:

- 📌 **Tougher on offences:** The employer gives a black worker a final written warning for being late. A white worker who is late just as often as the black worker is only given a first written warning.
- 📌 **A less favourable disciplinary process:** The employer gives a pregnant woman only 2 days' notice of a disciplinary hearing. When she is dismissed, the woman is told to leave immediately and is given pay in lieu of notice. A non-pregnant woman who commits a similar offence is given 7 days' notice of her own disciplinary hearing. She is also dismissed, but she is allowed to work her notice.

There can be no justification for direct discrimination based on one of the protected characteristics (except direct age discrimination).

However, the employer may prove that the reason for treating the worker differently has nothing to do with race, sex etc. For example, the black worker who was given a final written warning for lateness already had a first written warning for that offence; the white worker had a clean record.

Proving direct discrimination in a disciplinary context

The best evidence of direct discrimination is to find another worker of a different race, sex etc who was treated differently (better) in similar circumstances. Such a person is called a 'comparator'. It is not essential to find a comparator, but it makes discrimination much easier to prove.

Comparators' circumstances are not always absolutely identical. But the more similar their situation, the harder it is for the employer to prove there is an innocent explanation for the different treatment (eg the black worker had a prior warning, the white worker did not).

Other useful evidence of direct discrimination may be:

- 📌 the disciplining manager made offensive remarks (but it is hard to prove this).
- 📌 black workers, women etc (as relevant) are generally disciplined more harshly than others.
- 📌 the employer has not followed its disciplinary and other policies. This only works if the employer does usually follow its policies.

It is not enough that the employer is acting unfairly. Discrimination involves *different* treatment, not purely unfair treatment. The employer may treat all workers unfairly. However, incredibly unfair treatment without any explanation (not even an explanation showing the employer in a bad light) may help prove direct discrimination.

Victimisation

Victimisation occurs where the employer treats a worker less favourably because the worker has previously complained about discrimination (eg in a letter or grievance) against him/herself or against a colleague. The complaint need not be true but it must be made in good faith.

For example, an older worker complains that he did not get promoted because of his age. Soon after, the employer finds a pretext to make him redundant.

Proving victimisation in a disciplinary context

It is necessary to prove:

- (1) the worker made the complaint about discrimination. This is easier if the original complaint was in writing.
- (2) the worker was victimised (treated worse) as a result.

The following evidence helps prove victimisation:

- finding a comparator, ie another worker, who has not made any allegations of discrimination, who was treated differently (better) in similar circumstances.
- showing the worker was treated differently and worse after s/he made the allegation compared with his/her treatment in similar circumstances before. For example, before she complained of discrimination, a worker was offered lots of overtime; afterwards, she was not.
- the act of victimisation occurs fairly soon after the worker's complaint of discrimination.
- managers made remarks showing they were upset about the original complaint of discrimination.

Harassment

This involves unwanted treatment for reasons related to race, sex etc which has the purpose or effect of violating the worker's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him/her. As to whether the conduct has such an effect, the test is whether, having regard to all the circumstances, including in particular the worker's perception, it should reasonably be regarded as having that effect.

Discriminatory disciplinary action tends to be treated as direct discrimination and, if it followed a complaint, victimisation. However, it may form part of a wider pattern of harassment. To prove harassment, a worker must show

- 📌 the actions actually occurred.
- 📌 they were unwanted.
- 📌 they were because of/related to race, sex etc

Indirect discrimination

This is where the employer has unjustifiably applied a provision, criterion or practice which disadvantages the worker and which puts or would put others of the worker's race, sex etc at a disadvantage.

It may occur in a disciplinary context where the worker is disciplined for not meeting indirectly discriminatory requirements, eg

- 📌 a worker is dismissed for poor performance in that his written reports are not up to standard. The reason for this is that English is not his first language. He is perfectly able to do his job generally and it would not be difficult for the employer to ask someone to check through the grammar in the occasional reports the worker writes.
- 📌 a worker is dismissed for taking more than 3 days compassionate leave when his mother died. He needed to take 10 days because his mother lived in Trinidad, which involved a long flight, and he also had to make practical arrangements while there.

Once the worker has shown s/he is at a disadvantage and others of his/her group would be at a similar disadvantage, the employer must justify its position.

Whether to mention discrimination?

A worker needs to take a careful decision whether to raise discrimination when facing disciplinary action. Unfortunately, mentioning the possibility of discrimination tends to upset managers and can make the situation even worse. Although it is unlawful to victimise workers for raising such concerns, the reality is that it does happen

On the other hand, failing to mention discrimination can also cause major problems:

- 📌 if it really is discrimination, then the worker will get disciplined and the workplace situation worsen anyway.
- 📌 if the worker only mentions discrimination after s/he has been dismissed or when s/he goes to the employment tribunal, the tribunal may not believe him/her.
- 📌 even if the worker wins his/her discrimination case in the tribunal, s/he may get reduced compensation if the tribunal believes s/he should have raised the matter as a grievance under the ACAS Code.

It is important to take a decision at the outset whether to mention discrimination. The worst thing to do is not to mention it at the outset, but to come out with it half way through the disciplinary process when the worker is under pressure and upset. What can happen then is that the allegation is not recorded in the minutes or it is not properly investigated or the worker is accused of making it up. Remember that if the worker truly believes what is happening is discrimination, it is very likely that this will come out under pressure, whatever the worker's initial intentions.

If the worker does intend to raise discrimination, s/he must do so in writing so that it can't be overlooked. There is no uncontroversial way to raise discrimination, but there are different tones. A softer tone might say 'My manager may not be aware of it, but I feel she is picking up on any small mistakes I make, whereas she is not picking up on similar mistakes made by my younger colleagues'. On the other hand, using a word like 'harassment' raises the temperature and may be harder to prove. Of course the appropriate language depends on the nature of the alleged discrimination.

It is up to the worker whether to raise discrimination, not the adviser. The adviser's role is to advise on options and explore possibilities. Advisers must be careful that they always include discrimination in their advice where it is a possibility, and that they do not only think of it where the worker has not been there long enough for unfair dismissal protection. Discrimination is important in its own right as a matter of principle, even if the worker is also eligible to claim unfair dismissal. On the other hand, discrimination should not be claimed simply as a way round not qualifying for unfair dismissal.

Procedure: raising discrimination in the disciplinary process

Usually the correct time to take stock of the situation and decide whether the bringing of disciplinary action may be discriminatory is once the allegations have been clearly set out. At that point, the worker should write to the employer clearly raising the issue.

In some cases, it is not the bringing of the disciplinary action which is discriminatory – after all, a much lower level of evidence is necessary for there to be a case to answer – but rather the decision on the evidence to impose a disciplinary sanction. If so, the appropriate time to raise the issue of discrimination would be on the appeal.

Either way, the employee should write a letter clearly making the allegation (see sample p49). Be clear if victimisation (in the legal sense) is alleged – it is not necessary to use the word, but it should be specified that the adverse treatment is a result of making an earlier complaint of discrimination.

It is important that the employer is prepared to look into the issue of discrimination as part of the disciplinary or appeal process. It is too late to consider it after a decision has been made. Some employers do not investigate the issue properly, for example blocking any evidence about the treatment of comparators – ‘we don’t discuss other people’. The problem is that a complaint of discrimination cannot usually be properly investigated without looking at comparators. See p49 for a sample letter to an employer making these objections.

If the disciplinary is part of a much wider pattern of harassment, the worker should lodge a grievance and the employer should be asked to consider the grievance first (see p16 regarding the interaction of disciplinaries and grievances).

The employee needs to collect his/her own evidence of discrimination and may need to ask the employer for evidence in its own possession regarding the treatment of others. Employers may refuse to reveal information about comparators because of the Data Protection Act. One way round this could be to obtain the comparator’s consent to reveal his/her details or to ask the employer whether it has sought the comparator’s consent.

Disability: reasonable adjustments to the disciplinary process

The worker may be at a disadvantage in participating in the disciplinary process because s/he has a physical or mental disability. If so, the employer must make reasonable adjustments.

Note that:

- 📌 the worker must have a disability which is covered by the definition in the legislation.
- 📌 s/he must be disadvantaged by the way the employer is carrying out the disciplinary process.
- 📌 the employer must be aware that the worker has a disability and is likely to be at a disadvantage.
- 📌 the employer only needs to make *reasonable* adjustments.

This section of this Guide is only talking about making the disciplinary process accessible. It is not talking about the situation where workers feel they are being disciplined because they are disabled or because reasonable adjustments have not been made to enable them to undertake their jobs.

The revised disability *Code of Practice on Employment and Occupation* gives examples of what adjustments may be reasonable and should be taken into account by tribunals.

For more detail on the law, evidence and examples regarding who is covered by the legislation and what kind of reasonable adjustments should be made, see *Proving disability and reasonable adjustments: a worker's guide to evidence under the DDA* (sources, p50).

The definition of disability

Many workers have impairments, temporary or permanent, which fall within the wide definition in the legislation. A worker is 'disabled' if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities. Long-term means it has lasted or is likely to last for at least 12 months (or for the rest of the worker's life).

Those with cancer, multiple sclerosis, HIV infection or who are registered blind or partially-sighted are always covered. Otherwise it very much depends on the severity and length of the effects of the impairment. For example, the following impairments may or may not be covered, depending on the individual:

- 📌 sensory impairments.
- 📌 invisible disabilities such as epilepsy, diabetes, tendency towards migraine
- 📌 physical impairments including back injury, RSI.
- 📌 impairments whose effects are corrected by medication or aids.
- 📌 mental impairments or illnesses, eg dyslexia, learning difficulties, clinical depression.

Be careful about depression. Sometimes it is covered, sometimes it is not. Many workers are very badly affected by ongoing disciplinary action, or the threat of it, and this can make them ill. However, an ordinary feeling of unhappiness or low mood will not be enough to fit the definition. Nor will a short-term episode of extreme depression. There are specialist pages on 'Depression' in the above-mentioned *Proving Disability Guide*, which will help you assess whether the worker's condition is covered.

Some workers will want delays in the disciplinary process because they can't face going to a hearing. Unless they are genuinely suffering from depression which amounts to a disability, they are in a weak position. This is why it can be so important to decide whether they are covered by the definition. However, even if they are covered, this does not mean they can avoid disciplinary action indefinitely (see below regarding reasonable adjustments and depression).

At a disadvantage

It is not enough that the worker has a disability and is upset because s/he is being disciplined.

There must be something in the disciplinary process which puts the worker at a disadvantage *because of* his/her disability. For example:

- 📌 a worker has a hearing impairment and cannot fully understand what is being said at the disciplinary hearing.
- 📌 a worker has severe dyslexia and the disciplinary charges have been written in an unintelligible way.

The employer must know

Employers have no duty to make reasonable adjustments if they don't know and can't reasonably be expected to know that the worker has a disability and is likely to be substantially disadvantaged as a result.

If s/he has not done so before, the worker should therefore write to the employer explaining his/her disability, the disadvantage which a particular aspect of the disciplinary process causes and asking for an adjustment. Ideally, the worker would specify what adjustments would be helpful.

sample letter requesting adjustments

I am writing on behalf of Alex Miller to ask you to adjust some of the arrangements for the disciplinary hearing next week. Mr Miller has colitis, which means he needs to be near a toilet, to have breaks immediately on request and not to sit through long meetings without a break. Can you please arrange for this matter to be handled sensitively, for a suitable location to be chosen and frequent breaks. Mr Miller would be grateful for your written confirmation of arrangements in advance of the hearing.

Only adjustments which are reasonable

The employer must carry out adjustments which a tribunal would think reasonable – not just what that particular employer happens to think would be reasonable.

This is a very strong duty on the employer. If necessary, special arrangements must be made and the worker should be treated more favourably than others. For example, if a severely depressed worker needs longer to prepare his/her case, an employer cannot just say 'under our procedure, no one gets more than 2 weeks'.

The House of Lords (now Supreme Court) in the key case of *Archibald v Fife Council* [2004] IRLR 652, said this about the duty:

'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.'

Sample letter where employer refuses to make reasonable adjustments

I am writing on behalf of Sally Butterworth, who would like her brother to attend the disciplinary hearing with her next week. I understand you feel Sally does not need any special assistance in answering questions at a disciplinary. However, the law says the necessary adjustments are measured according to what an employment tribunal would think was reasonable. It is not a matter of an employer's subjective opinion (however well-intended). Unfortunately Sally feels that, because of her severe dyslexia, she will not be able to properly understand and participate in the disciplinary hearing without the assistance of someone who understands her condition. You said that all workers are allowed to bring a work colleague with them to a disciplinary and you felt it unfair to treat Sally more favourably by allowing her to bring someone from outside. However, as I have explained, Sally is in a different position in that she is at a particular disadvantage because of her disability. As you may be aware, the Supreme Court in the key case of *Archibald v Fife Council* said 'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.' For these reasons, Sally will be asking her brother to come along.

Examples of reasonable adjustments

What adjustments are reasonable will depend on the circumstances of each case, but the following are possibilities:

worker with migraines: postponement of the hearing date at the last minute because the worker wakes up with a severe migraine.

worker with photosensitive epilepsy: holding the disciplinary hearing in a room which has natural lighting and not in the usual office which has fluorescent lighting.

worker with learning disabilities or dyslexia: giving extra clear explanations of the significance and potential consequences of disciplinary hearings; the disability Code recommends allowing the worker to be accompanied by a friend, relative or helper who is not employed by the organisation; allowing the worker's companion to help the worker answer questions.

worker with hearing impairment: setting out allegations clearly and fully in writing; arranging for an interpreter throughout the disciplinary stages.

other adjustments, as appropriate: allowing additional time to prepare, being flexible over dates, postponing the hearing until the worker is fit to attend (presumably not indefinitely), allowing an appeal

to be lodged outside the time-limit in the employer's disciplinary procedure. If travel is difficult, conducting the hearing by telephone, at home or at another suitable venue. Ensuring the worker is not disciplined for conduct which may be reasonably explained by his/her disability, eg a deaf person apparently disobeying a verbal instruction or someone losing their temper when in pain.

The fact that disciplinary proceedings are pending is not necessarily a reason not to proceed with other reasonable adjustments such as relocation (see *Home Office v Beart* [2003] IRLR 238, CA).

What if the employer refuses to make the adjustments?

If the employer still refuses to make the requested adjustment, even after the worker has made a written request, the worker has to decide whether to attempt to attend the disciplinary anyway or to refuse to go, and possibly hope the employer relents.

Refusing to go is highly risky and if the matter comes before an employment tribunal subsequently, the tribunal may not agree that the worker was entitled to insist on the particular adjustment in question. Therefore, if at all possible, it is best to attend the disciplinary, but to write a further note of protest. The following example follows on from the earlier sample letter.

sample letter where employer refuses to make reasonable adjustment

I am writing again on behalf of Sally Butterworth in connection with her disciplinary hearing on Tuesday. I understand that, despite my previous letter, the company still refuses to allow Sally to be accompanied by her brother. Sally will therefore have to attend the disciplinary without the assistance she feels she needs to be a full participant. In the circumstances, I would ask that you let her have a copy of the minutes immediately following the meeting and let her have the opportunity of providing further written comments within, say, 5 days.

Tribunals and time-limits

Employment tribunals

There is a legal right to complain about unfair dismissal in an employment tribunal, but there is no legal right to complain about unfair disciplinary action short of dismissal. When considering whether a dismissal is fair or not, a tribunal will usually take account of any previous disciplinary action.

In rare cases, disciplinary action short of dismissal may be so grossly unfair that an employee can resign and claim constructive unfair dismissal. This will be very unusual and it is not advised.

To claim unfair dismissal, a person must be an employee with at least one year's continuous service.

Unlike unfairness cases, tribunal cases for discrimination can cover disciplinary action short of dismissal as well as dismissal itself. There is no minimum service requirement to claim discrimination and any workers can claim – not just employees.

The law

Unfair dismissal

In unfair dismissal cases, the employer must prove why it dismissed the employee. The tribunal then decides whether it was reasonable for the employer in all the circumstances to have dismissed the employee. The band of reasonable responses test applies, ie if one reasonable employer might reasonably have dismissed the employee and another reasonable employer might reasonably not have dismissed the employee, the employee will lose. To win, the tribunal must consider that dismissal was not a reasonable option.

Discrimination

To win a direct discrimination case, a worker must show the employer treated him/her less favourably (or differently) from how it would have treated someone of a different race, sex, religion, sexual orientation, age or who is not disabled or pregnant. See p34 for more detail.

Tribunal compensation

Unfair dismissal

A tribunal can order that an employee is reinstated to his/her job, but it is unlikely to make this order if the employee caused or contributed to some extent to the dismissal or if there has been a breakdown in trust and confidence. If the tribunal does make a reinstatement order but the employer refuses to take the employee back, the tribunal cannot insist. It can only award an additional financial award.

Where no reinstatement is ordered, compensation usually comprises a basic award (calculated according to the employee's age and length of service, like statutory redundancy pay) and a compensatory award. The compensatory award mainly comprises loss of earnings (net of tax) and loss of any pension rights, subject to an overall upper limit (£65,300 for dismissals in the year starting 1 February 2010).

It is rare that anyone would get near the upper limit unless they were a high earner. Employees rarely get fully compensated for all their losses. Employees need to prove they have tried very hard to get a new job. Otherwise they may only get awarded a few months' loss of earnings. Compensation can also be reduced for:

- 📌 contributory fault: the degree to which the employee caused or contributed to his/her dismissal, eg because of some level of misconduct (even if it didn't deserve dismissal) or by failing to attend a disciplinary hearing.
- 📌 'Polkey': the employer had a fair reason for dismissal but went about it in an unfair way. Compensation can be reduced by a percentage to reflect the chances that the employee would still have been dismissed even if fair procedures had been followed.
- 📌 ACAS Code: compensation can be reduced by up to 25% if the employee fails to follow a relevant part of the ACAS Code, eg by not appealing against dismissal. Compensation can be increased by up to 25% if the employer fails to follow the Code.

Discrimination

Compensation can be awarded for injury to feelings as well as financial loss. If the employee suffers psychiatric injury, eg a nervous breakdown or severe depression, compensation can also be awarded for personal injury. There is no upper limit on how much can be awarded.

Injury to feelings awards tend to fall within 3 bands: a top band, normally between £18,000 and £30,000 for the most serious cases, eg a lengthy campaign of harassment; a middle band between £6000 and £18,000 for serious cases which do not warrant the top band; and a lower band of £500 - £6000 for less serious cases, eg where the act of discrimination is an isolated or one-off occurrence. Discriminatory disciplinary action will often fall in the middle band, but tribunal awards can be lower than expected.

If the discriminatory action is dismissal, the employee needs to show s/he has tried hard to get another job, just as in an unfair dismissal case.

Compensation can be increased or reduced by up to 25% if either the employer or the employee failed to follow a relevant part of the ACAS Code.

Time-limits

The tribunal claim must be lodged within 3 months of the act of discrimination, ie 3 calendar months less 1 day. If the discrimination is a dismissal, time runs from the termination date. For example, if the employee's termination date was 3 March, his/her tribunal claim must arrive at the tribunal office on or before 2 June.

Late claims are very rarely allowed, although there are some exceptions. For unfair dismissal, the employee must prove it was not reasonably practicable to have got the claim in on time. For discrimination, the worker must prove it is just and equitable to allow in the late claim. This is slightly easier, but still really hard.

It is not a good reason for a late claim that the appeal process has not yet been completed. The employee must always lodge the claim in on time. If the appeal later succeeds, the claim can be withdrawn. For example, a worker is given a final written warning on 18 May. S/he appeals. A date for hearing the appeal is fixed for 22 August. S/he must still lodge his/her tribunal claim by 17 August.

The now abolished statutory dispute resolution procedures allowed time extensions in some circumstances where the appeal was outstanding. Do not let these old rules mislead you.

If there are several acts of discrimination, the time-limit runs from each one. For example, a worker wants to complain about a disciplinary demotion on 10 February, a final written warning on 12 March and a dismissal on 8 April. To keep all three actions in time, count 3 months from the earliest event – the time-limit is 9 May.

In some cases, a sequence of events may amount to a continuing discriminatory state of affairs. If so, the 3 month time-limit can be counted from the latest event. However, never rely on this concept, because the tribunal may not agree.

Out of time events can be relied on as supporting evidence in the tribunal, but at least one provable discriminatory action must be in time.

Sample letters

Some general points about letters

Advisers should always offer to draft necessary letters for the employee. It is better to make important requests or comments in writing rather than verbally, so that there is a record. Ensure the letter is dated, has an address, is signed and a copy is retained.

Address the letter to the appropriate person. If someone from Human Resources is involved, usually it will be best to write to him/her.

The tone of the letter needs to be carefully considered, because it will make an impression on the decision-maker as well as on any later employment tribunal.

The letter can come from the employee or be written on the employee's behalf by an advice agency or solicitor. Employees often think that a solicitor's letter will save them from being disciplined. But not necessarily. It may antagonise the employer. Or it may not change the outcome, but simply make an employer more careful to be seen to be doing the right thing. Sometimes a well-written letter from the employee in person is more effective.

Think carefully about the purpose of the letter. Some letters are written because the employee does not feel confident about expressing him/herself verbally. Where the employee makes a request, eg for documents or for a postponement, the employer will not always agree. But it will nevertheless be important to show a later tribunal that the request was made and that the employer refused.

The following sample letters are only examples. Every case has its own considerations and tactics.

Letter clarifying allegations and requesting evidence (point 2, p2)

I have received your letter inviting me to a disciplinary hearing on 8 February on grounds that I lent my float to a colleague in a nearby shop, contrary to company rules. Could you please let me know whether you are accusing me of dishonesty or simply of breaking the rules (and if so, deliberately, or accidentally). I need to know this so I can put forward the appropriate defence. Could you please also let me have a copy of the statements which you have taken from witnesses about this incident. The ACAS Code says that I am entitled to receive copies of the statements prior to the disciplinary. Could you please let me have this written clarification and the documents at least 2 days prior to the hearing.

Letter setting out employee's defence (point 7, p2)

I am writing to make a few points in advance of my disciplinary hearing on 20 January. You have accused me of failing to ring up the till correctly on 4 March, when the mystery shopper visited. I would like to make these points:

1. I accept I made a mistake, but it was an honest mistake – you found the extra £3 in the till.
2. I only made one small mistake. Also, with the lay-out of the till, it is easy to ring up £9 rather than £6.
3. The shop was very busy all day and I was short-staffed that day because two of my salespeople were off sick. I had rung head office and asked for cover, but no one was supplied.
4. You only brought the error to my attention 2 weeks later. This made it impossible for me to remember exactly what had gone wrong, because I do hundreds of transactions each day.
5. I have worked for the company for 12 years and I have an exemplary record. Obviously I am extremely sorry that I made such a mistake and will do my utmost not to make any similar mistakes in the future.

Letter asking about notes/minutes (point 8, p2)

I am writing regarding my disciplinary hearing fixed for 12 March. Can I please suggest that you send me a copy of your minutes immediately following the meeting so that I can check they are accurate and we have an agreed record. Could you please confirm you will do this?

Letter of appeal (see p7)

Please take this as my letter of appeal against my dismissal on 3 May. I was dismissed for not clocking-in at the new factory. I believe it was very harsh to dismiss me for that reason. I worked for the company for 8 years and I have never had any warnings for anything before. I was on holiday when we moved to the new factory and no one had properly explained to me how to clock in when I returned. Also, I tend to arrive early for work and go in at the back door. The clock is situated by the front door.

As well as this, I believe that some of my colleagues failed to clock-in while I was on holiday and they were only given a written warning. I think it is unfair that I have been treated more harshly.

I also feel my disciplinary hearing was handled unfairly. I was called to the meeting on a few hours notice and I was not given enough time to prepare for it. I was so shocked and worried that I could not think clearly and I had no time to take advice.

I love my job and I am very sorry this misunderstanding occurred. I am of course fully prepared to clock-in in future, now that I fully understand the system and how important it is to the company that it is complied with.

Discrimination sample letters

Letter raising discrimination (see p36-p37)

I am writing with regard to the disciplinary hearing fixed for 14 April on grounds that I have been looking up the internet for personal use excessively. I believe I have been called to this disciplinary on racial grounds. There is no rule that we cannot look up personal things on the internet and everyone does it. My manager is aware that my white colleagues use the internet just as much as I do, if not more.

Letter asking for a discrimination grievance to be heard first (see p37-p38)

[As previous precedent, then:]

I feel this is part of a pattern whereby my manager has been picking on me. The only reason I can think of is that I am the only black member of staff in my department. For example, my manager also tells me off whenever I make personal phone calls, even though I rarely do this and others make far more calls than me. I would like the whole issue of my treatment by my manager to be considered first as a race discrimination grievance. I do not believe the narrow disciplinary issue can be fairly looked at in isolation.

Letter where employer refuses to investigate comparators (see p37-p38)

I am writing with regard to the disciplinary hearing held yesterday and your refusal to tell me the targets achieved by my younger colleagues. I was trying to explain why I felt I was being treated more harshly because of my age. When I said that some of my younger colleagues had achieved lower targets than myself, but had not been disciplined, you said 'we don't discuss other people'. This makes it impossible for me to prove my case. How can you properly investigate my concerns about discrimination without looking at how my younger colleagues have been treated in a comparable situation?

Books, guides and websites

- **Employment Law: An Adviser's Handbook.** By Tamara Lewis
Published Legal Action Group. Tel: 020 7833 2931. Edition 8 (2009). Updated every two years. For workers and their advisers in unions / voluntary sector. Guide to law, evidence, tactics and tribunal procedure, with comprehensive check-lists and precedents. Covers all key areas of employment law.

Central London Law Centre guides

- **A claimant's companion: a client's guide to cases in employment tribunals.** By Tamara Lewis.
Guide for advisers to hand out to their clients in employment tribunal cases to answer common queries and uncertainties. This is not a guide for clients to run cases themselves. Hard copies available from Central London Law Centre. Pdf can be downloaded from the law centre's website: www.londonlawcentre.org.uk/publications.html
- **Identifying employment cases: checklists for diagnosis and interviews.** By Tamara Lewis.
Published Central London Law Centre, February 2008. Useful guide on how to start investigating cases for generalist advisers or those new to employment law. Discrimination issues woven into general employment law throughout. Cross-references to *Employment Law: An Adviser's Handbook*. Available at www.londonlawcentre.org.uk/publications.html
- **Identifying discrimination in employment – a diagnostic and referral guide for busy advisers** (Edition 1. June 2008)
For generalist or inexperienced advisers, a very basic introduction to discrimination law. The guide aims to enable advisers to recognise potential discrimination cases where these are not presented by the client, and to ask sufficient questions to make sensible referrals to specialist agencies. Available at www.londonlawcentre.org.uk/publications.html
- **Proving disability and reasonable adjustments: a worker's guide to evidence under the DDA.** By Tamara Lewis. Published by Central London Law Centre. Updated (2009) version available on EHRC website, www.equalityhumanrights.com/uploaded_files/dda_workers_guide_reasonable_adjustments.doc With special focus on 26 different impairments.
- **Using the Data Protection Act and Freedom of Information Act in Employment Discrimination cases.** By Tamara Lewis. On EHRC website, www.equalityhumanrights.com/uploaded_files/dpa_and_foi_in_employment_discrim_cases.doc

Websites

ACAS	www.acas.org.uk
AdviceUK	www.adviceuk.org.uk
Citizens Advice	www.citizensadvice.org.uk
Employment Tribunals	www.employmenttribunals.gov.uk
Employment and Human Rights Commission	www.equalityhumanrights.com
Law Centres Federation	www.lawcentres.org.uk
TUC	www.tuc.org.uk

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