

Taking Grievances



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 raise grievances appropriately. Voluntary sector and trade union advisers are often consulted by employees who are unhappy about some aspect of their working conditions. It can become a habit to suggest that the employee starts by taking out a grievance. This is not always the best move. It may worsen a situation rather than improve it. The underlying strength of the employee's position needs thinking about.

Another temptation for busy advisers is simply to explain what a grievance procedure is, sending employees away to write their own grievance and make their own way through the process. This can be disastrous. Employees who are emotionally involved in their own circumstances can write unfocussed and aggressive grievances, raising far too many issues, including petty or unreasonable points, and antagonising their employer.

Many employees, if told to write their own grievance letter, will not do so at all because they will not feel confident about writing letters. Or they may go to private solicitors for a formal letter written on headed paper, which is not necessarily the best tactic.

A good adviser can:

- 📌 consider the purpose of the grievance and whether it should be taken up at all
- 📌 help write a sensible and focussed grievance with an appropriate tone
- 📌 decide on the underlying legal strength of the employee's position
- 📌 if discrimination is a potential issue, discuss whether and how it should be raised.

Terminology

Different employment rights have different eligibility requirements, and sometimes it is necessary to be an 'employee' whereas for other rights, it can be sufficient to be a 'worker'. This makes it hard to choose a neutral term for this Guide. However, as the ACAS Code on Disciplinary and Grievance Procedures only covers employees, this guide uses the term 'employee' except in the sections on discrimination and on the statutory right to be accompanied.

Disclaimer

While every attempt has been made to state the law accurately in this Guide, it is primarily a practical rather than legal guide. Summaries of the law in different areas are just that, and advisers need to research the precise legal rights with which they are dealing. No responsibility can be taken for advice given on the basis of the contents of the Guide.

Grievance Overview

What is a grievance?

The purpose of grievances is to give employees a way to raise with management internally their concerns about their working environment or work relationships.

Grievances tend to be about matters such as changes in terms and conditions, excessive workloads, being refused holidays, unfair or discriminatory treatment by managers, and harassment from colleagues.

Less commonly, workers may get together and write a collective grievance. This is more likely to happen in a unionised environment.

The grievance procedure

Employees should be told the procedure for taking out a grievance. Under section 1 of the Employment Rights Act 1996, employers must give employees a written statement of the particulars of their employment no later than two months after they started work. Under section 3, the statement must include details of a grievance procedure, ie how to start a grievance and who to write to.

The ACAS Code of Practice on Disciplinary and Grievance Procedures also recommends that grievance procedures are set out clearly (see p8).

Grievance procedures tend to be simple with small private sector employers, but can get quite detailed and complex in the public sector. Either way, the key elements are usually:

- 📌 Optional informal stage
- 📌 First formal stage
- 📌 Appeal stage

For more detail of different grievance procedures and how to work through the stages, see p10.

What is the point of a grievance?

Employees need to think what they are trying to achieve when they take a grievance. It may not achieve anything other than antagonising their employer. For a further discussion of this, see p22.

How to write a grievance

How to write a grievance can involve tactical considerations according to what the employee wants to achieve. For a further discussion of this, see p25.

Statutory dispute resolution procedures

From 2004 until abolished in April 2009 (with some transitional rules), statutory dispute resolution procedures applied. These made it compulsory to send grievances before starting tribunal claims for discrimination and other matters. There were complex rules about what constituted a grievance, how the grievance procedure should be conducted and tribunal time-limits. Advisers should not get confused by any special rules they remember from when those procedures applied, but which are no longer in existence.

What happens if the employer won't listen to the grievance?

Two different problems may arise in connection with use of the grievance procedure:

- 📌 The employer fails to take any steps to hear the grievance
- 📌 The employer listens to the grievance but fails to offer the employee the desired solution to the problem.

An employee's reaction to the rejection of his/her grievance complaint is often to want to resign. S/he needs to be clear about what is prompting the resignation. Is it that the employer has not dealt with the grievance in a procedurally fair way? Or is it simply that s/he does not like the outcome? Either reason causes problems in proving constructive dismissal.

Can the employee resign if the employer won't hear the grievance?

Ignoring a grievance completely or failing to hear it within a reasonable period may be a fundamental breach of contract by the employer, entitling an employee to resign and claim constructive unfair dismissal.

The EAT in **W A Goold (Pearmak) Ltd v McConnell** [1995] IRLR 516, said that failure to provide and implement a procedure to deal with an employee's grievances can amount to conduct which entitles an employee to resign and claim constructive dismissal. It is an implied contract term that employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. There should be a procedure for dealing promptly with grievances instead of 'allowing them to fester in an atmosphere of prevarication and indecision'. This is underlined because it is a statutory requirement that details of a grievance procedure are provided in the compulsory statement of particulars under section 1 of the Employment Rights Act 1996.

However, resigning for this reason is not recommended. Constructive dismissal claims are always difficult to prove. In this context, there would be the following pitfalls:

- 📌 It is necessary to show the employer has acted so badly that it amounts to a fundamental breach of contract. It is always uncertain what amounts to bad enough behaviour by an employer or whether the relevant facts can be proved. Is it clear that the employer is refusing to hear the grievance or is the matter in hand? If the employer is dragging its heels, has it yet come to the point where the delay amounts to a fundamental breach of contract?
- 📌 The employee needs to resign promptly in response to the fundamental breach and not 'affirm' by waiting too long. There is no set time period for how long an employee can wait, so the employee risks getting his/her timing wrong.
- 📌 On the other hand, the employee must not jump the gun and resign while matters are pending. For example, if the employee wrote to the employer setting a four week deadline for the grievance to be heard, it would be premature to resign before the four weeks was up.
- 📌 The employee needs to be clear whether s/he is resigning because of the delay in hearing his/her grievance and providing a decision, or because s/he does not like the outcome of the grievance, which is a different matter. The latter is unlikely to support a constructive dismissal claim unless it amounts to a fundamental breach of contract in itself (eg as in a unilateral variation case, see p41).
- 📌 Even if the employer's actions were in fundamental breach of contract, the employee will only win his/her case if s/he can show such actions were unfair (or discriminatory). This does not always follow.
- 📌 The employee needs to be sure s/he is an employee with at least one year's service before resigning with an intention of claiming constructive unfair dismissal.
- 📌 The employee will have lost his/her job and even if s/he goes on to win a tribunal case, s/he may not get compensation which makes up for his/her losses.

In summary, it is usually very unwise for an employee to resign because of an employer's failure to deal with a grievance if s/he is intending to bring an unfair constructive dismissal case, except perhaps in extreme circumstances, eg

- 📌 s/he had a serious grievance
- 📌 the employer completely failed to make any arrangements to listen to the grievance
- 📌 the employee wrote several chaser letters.

What if the employer hears the grievance but does not give the desired solution?

If the grievance does not resolve an employee's concerns, s/he needs to decide whether or not s/he takes legal action. This depends on the nature of the problem and the employee's legal rights.

One option, if the employee is unhappy about the unresolved work situation, may be to resign and claim constructive unfair dismissal. As previously mentioned, this is always a dangerous option because such cases are hard to win. As mentioned above, to win a constructive dismissal case:

- 📌 The employer must have been in fundamental breach of contract, eg by seriously breaking a contract term or by destroying the implied term of trust and confidence.
- 📌 The employee must resign in response to the breach and not 'affirm' by waiting for too long because s/he can't make up his/her mind.
- 📌 On the other hand, the employee must not 'jump the gun' by resigning prematurely, ie at a time when the employer has not conclusively broken the contract. It is usually jumping the gun to resign during a grievance process which is being held regarding the matter in question. This is because tribunals tend to say the fact that the employer is going through the grievance process shows its mind is open and decision is not yet finalised.
- 📌 Even if the employee satisfies these stages, s/he still needs to prove the constructive dismissal is unfair, which does not always follow. S/he also needs to be eligible to claim unfair dismissal, eg have at least one year's minimum service (unless resigning because of one of the automatic unfair dismissal grounds which does not require one year's service).

There may be other legal options, depending on the situation. For example, employees can bring discrimination claims without necessarily leaving the job.

In most cases, employees do nothing and just carry on. At least they have partially protected their position by recording their concerns in writing, although there is always the risk that they have escalated work tensions.

CHECKLIST:**Taking a Grievance**

Deciding whether to take a grievance:

- 📌 Consider the reason for taking a grievance and what the employee is trying to achieve (see p22).
- 📌 Decide whether to take a grievance or whether to write a less formal memo or letter. Note that the employer may well treat an informal letter as the first step of the grievance procedure even if it is not labelled a grievance.
- 📌 Consider whether a letter should instead come from a legal or voluntary sector adviser, although this will be unusual (see p25, 'who should write the grievance?')
- 📌 Consider whether to raise the issue verbally and informally before embarking on the grievance procedure (see comments on p10).

Once it has been decided to embark on a grievance:

- 📌 Check whether there is a written grievance procedure. If so, follow those stages. Otherwise just write a letter raising the relevant issues and stating that it is a grievance. Decide who to address the grievance to and what to put into the letter (see p25).
- 📌 If the employee is concerned about discrimination, decide whether to raise this in the grievance (see p32).
- 📌 Consider whether the employee needs any witnesses to support the grievance (see p19).
- 📌 Make sure the employer sets a meeting/hearing within a reasonable time. If not, write a chaser letter.
- 📌 Find a companion to take to the grievance meeting/hearing (see p17).
- 📌 Request any reasonable adjustments needed for the meeting/hearing (see p35).
- 📌 Ensure there is a written outcome to the grievance. If no written outcome is provided within a reasonable time from the hearing, write a chaser letter.
- 📌 Ensure the written outcome, if unsatisfactory, sets out the employer's reasons for its position. If it does not, write for clarification.
- 📌 If the outcome is unsatisfactory, write a letter of appeal. Make sure this is written within any time-scales set in the grievance procedure. If there are no time-scales set for appealing, write the letter promptly, eg within a week of the outcome, in any event.
- 📌 If the outcome of the appeal is also unsatisfactory, check whether there are any further appeal stages under the grievance procedure. If not, consider what to do next, and in particular, whether to take any legal action.

Be careful at all stages not to miss time-limits for legal action. These may expire before the grievance procedure is completed. Grievances and appeals do not extend time-limits regarding the original action complained about.

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.

The statutory ACAS Code of Practice on Disciplinary and Grievance Procedures provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. It does not cover redundancy or failure to renew fixed-term contracts.

The Code is intended to provide the standard of reasonable behaviour in most instances.

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

A failure to follow the Code is not in itself against the law. However, employment tribunals will take the Code into account when considering relevant cases.

Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code. This means that if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25%. Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the code they can reduce any award they have made by up to 25%. This rule is set out in section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

If an employee later wins a discrimination case, for example, and either the employee or the employer did not follow the ACAS guidelines regarding lodging and dealing with grievances, the employee's compensation may be increased or reduced according to who is at fault.

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 compensation because, although only employees can claim unfair dismissal, other types of worker can make discrimination and other claims.

ACAS says in the foreword to its Code, but not in its body (so it is not technically a Code recommendation) that employers and employees should always seek to resolve grievance issues within the workplace; where this is not possible employers and employees should consider using an independent third party to help resolve the problem. The third party need not come from outside the organisation but could be an internal mediator, so long as they are not involved in the grievance issue. In some cases, an external mediator might be appropriate.

The Code does not cover collective grievances.

Key Principles from the Code

Grievances are concerns, problems or complaints that employees raise with their employers.

Grievance procedures should be set down in writing, be specific and be clear. Employees and their representatives should be involved in the development of rules and procedures. It is also important to help employees understand what the rules and procedures are, where they can be found and how they are to be used.

If it is not possible to resolve a grievance informally, employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, appeals, decisions or confirmation of those decisions.

Employers should carry out any necessary **investigations**, to establish the facts of the case.

Employers should allow employees to be **accompanied** at any formal grievance meeting.

Employers should allow an employee to **appeal** against any formal decision made.

The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

Overlapping grievance and disciplinary cases: Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

References to other provisions of the Code are set out throughout this guide where relevant.

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. It also contains sample disciplinary and grievance procedures.

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.

Grievance procedure

Usually there is a written grievance procedure as it is a legal requirement (see p3). It may be set out in the employee's contract of employment or section 1 statement of particulars or, more often, in a staff handbook.

Some grievance procedures, especially with small private sector companies, are set out in just a few lines. Other procedures, particularly in larger public sector and unionised environments, can be very elaborate, and set out over several pages.

If there is a written procedure, employees should follow the steps of that procedure. If there is no written procedure, employees can simply write a grievance letter to their immediate manager or, if they prefer, to someone more senior, eg the head of department or Human Resources manager. If this first stage of their grievance is unsuccessful, they can write an appeal letter to someone more senior.

Written procedures, except where very basic, tend to include the following elements:

Scope: ie what matters the procedure covers and what it excludes

There is usually a general statement, eg that 'a grievance relates to any matter that a member of staff may wish to raise in connection with his/her employment.'

In more detailed procedures, especially those in the public sector, exclusions are often set out, eg:

- 📌 disciplinary or dismissal matters
- 📌 capability issues where the employee has already been notified of a pending investigation
- 📌 matters relating to bullying or harassment.
- 📌 issues of race, sex, disability, sexual orientation, religion or age discrimination

The procedures usually clarify whether they can also be used for collective grievances.

Bullying/harassment and/or unlawful discrimination is sometimes dealt with under the mainstream grievance procedure and sometimes has its own procedure. Where it is dealt with under the mainstream procedure, there is nevertheless often a separate document with policy guidelines.

Stages of the procedure

Informal stage

All procedures offer an informal first stage which is encouraged. This usually entails the employee raising

a verbal grievance with his/her immediate line manager. If the latter is the source of complaint, this stage may be skipped or the employee may talk to someone else.

Sometimes this informal stage is referred to as 'Stage 1 – informal stage'. Sometimes it is simply 'Informal stage'.

Whether or not an informal verbal approach is sensible depends on the issue and general circumstances. In some situations, it may be useful to say, 'Can I have a brief word about something which is worrying me?' In other situations, the employee has already unsuccessfully tried to communicate with the line manager or the issues are so serious, eg sexual harassment or discrimination, that a verbal approach is unwise. The risk of an informal verbal approach is always that it will not lead to a solution, but meanwhile it will antagonise the manager. It is possible that, in discrimination cases for example, the manager will later deny a complaint was even made.

Formal stages and time-scales

There is no absolute rule about what the stages of a grievance procedure should be. As a minimum, there needs to be one formal stage and one appeal stage. The ACAS Code sets out some basic guidelines.

Extracts from the ACAS Code

If it is not possible to resolve a grievance informally, employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.

Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary.

Following the meeting ... decisions should be communicated to the employee in writing without unreasonable delay and where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed they can appeal if they are not content with the action taken.

Where an employee feels that their grievance has not been satisfactorily resolved, they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.

Appeals should be heard without unreasonable delay ... and wherever possible, by a manager who has not previously been involved in the case. The outcome of the appeal should be communicated to the employee without unreasonable delay.

There are usually two and sometimes three formal stages (including the appeal stage). In local authorities, the final stage is usually an appeal to Councillors.

In some procedures, one or more of the formal stages may involve a formal hearing with witnesses. This is most common in unionised public sector environments.

In other procedures, all the formal stages simply involve a meeting between the employee, his/her representative, the manager dealing with the grievance or grievance appeal, and someone from Human Resources. The meeting with the employee takes the form of an investigation of the issues and discussion. In such cases, the manager dealing with the grievance makes his/her own enquiries and interviews other witnesses (including the person complained about) separately.

If there is no written procedure, it is highly unlikely that the employer would hold a formal hearing, and a meeting is far more likely.

Many written procedures set out time-scales for

- 📌 the length of time between the employee's grievance or appeal and any meeting / hearing
- 📌 the length of time between the meeting / hearing and the outcome
- 📌 the time allowed to get in an appeal or ask for the next stage

Whether or not time-scales are set out it may be a breach of contract if the employer sits on the grievance and fails to take any steps to look into it (see p4).

Procedure at formal grievance hearings

If the grievance procedure gives the employee a right to a full grievance hearing with witnesses present, the procedure will often set out the steps which will be followed at that hearing. Where there are lengthy grievance procedures, these steps are often set out in an Appendix. The most usual procedure is as follows:

- 📌 the employee or his/her representative states the employee's case
- 📌 this includes calling witnesses
- 📌 the management representative can question the employee's witnesses
- 📌 the panel can question the employee's witnesses
- 📌 the employee or his/her representative can re-examine their witnesses
- 📌 the management representative presents management's case and calls witnesses
- 📌 the employee or his/her representative question the management's witnesses
- 📌 the panel questions the management witnesses
- 📌 the management representative re-examines their witnesses
- 📌 the management representative sums up
- 📌 the employee or his/her representative sums up

This kind of procedure works fairly well in a unionised public sector environment where the employee has a trade union representative. It tends to be intimidating in a situation where the employee has no representative.

Pro forma grievance forms

Grievances are usually just written as an ordinary letter. But some procedures have compulsory or optional grievance forms for the employee to complete. This is more likely in a public sector unionised environment. Most of these require the employee to set out:

- 📌 details of the grievance
- 📌 supplementary information / evidence
- 📌 details of action taken at informal level / previous grievance stages
- 📌 desired resolution: the outcome sought

Even if there is no standard form, these are details which the employee may want to put into a grievance letter anyway. See p25 regarding writing a grievance.

The right of representation

The law gives employees the right to be accompanied by a work colleague or a trade union representative. (See p16.)

The employee's own grievance procedure may simply repeat the legal right or may give increased rights.

Status Quo

Some grievance procedures have a status quo clause, eg

'Until all stages in the procedure have been exhausted, the 'status quo' must be maintained, that is the working and management arrangements that applied before the dispute.'

This can be particularly important if, for example, the grievance concerns an employer's attempt to impose changes to terms and conditions. For more detail of the effect of taking a grievance in the context of unilateral variation, see p41.

In the absence of a clear status quo rule in the grievance procedure, there is no rule that, just because a grievance has been taken out, the status quo must be maintained until the grievance procedure is completed. In particular, if the employee lodges a grievance about a lawful instruction to which s/he objects, this does not necessarily mean s/he is entitled to refuse to obey the instruction until his/her grievance is decided. If s/he does refuse to obey the instruction and the employer dismissed him/her, whether s/he would win an unfair dismissal case would depend on a number of factors, eg what the instruction was; whether it concerned an urgent or irreversible situation; how long the grievance would take to be heard;

whether it was reasonable for the employer to await the outcome of the grievance, and whether a successful grievance could remedy the effect of the status quo not applying in the meanwhile. The following case provides a useful warning:

Samuel Smith Old Brewery (Tadcaster) v Marshall & Marshall UKEAT/0488/09

The claimants managed a pub and could take on staff up to a maximum weekly staff hours allocation which was decided upon by the employer. At the time the dispute arose, the weekly allocation was 84 hours. The employer was losing a lot of money, so in December 2007, it instructed the claimants to reduce the weekly hours. The claimants took out a grievance which was rejected and the claimants were instructed to reduce their hours with immediate effect, as they still had not done so. The claimants appealed. Meanwhile they said they would work to the status quo. There was in fact no status quo clause in their grievance procedure. They were told that if their grievance appeal succeeded, their hours would be increased at that point. After several warnings, the claimants were dismissed for refusing to reduce their hours as lawfully instructed under their contracts. They had refused to attend the disciplinary until their grievance appeal was heard.

The employment tribunal thought the dismissal was unfair because it took place only one week before the grievance appeal was due to be heard. But the decision was overturned by the Employment Appeal Tribunal. This was not a case where the first grievance hearing had not been heard. It was only the appeal. There was no law that employers must go through the whole grievance procedure before they can dismiss. The claimants could make the points they were going to make at the grievance appeal at the disciplinary hearing.

It was also relevant that claimants had not said at the time that, if they had lost the grievance appeal, they would have agreed to the reduced hours.

Relationship with disciplinary action

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 grievance or 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 justify a grievance - eg, as already stated, an allegation of a pattern of discriminatory treatment including, but not confined to, the current disciplinary.

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.

See also the case of **Samuel Smith Old Brewery (Tadcaster)** referred to under 'status quo' above.

Representation at the Grievance Hearing

Check the grievance procedure in the employee's contract. This may give employees an express right to be represented at the grievance 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 grievance 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.

A grievance hearing for these purposes is one 'which concerns the performance of a duty by an employer in relation to a worker'. This would cover a contractual or statutory duty, eg a grievance about failure to pay some due wages or refusal to allow holidays. Hopefully tribunals would interpret an employer's duties as having a wide scope, but there could be some situations which would not fall within this wording, eg a request for a pay rise which an employer is not obliged to give under the employee's contract or under general legislation.

The 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.

The employer must allow a worker to take paid 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 34 – 37. This means there may be a compensatory uplift of up to 25% where, eg, the employee wins discrimination case and the employer did not grant the employee's request to be accompanied.

The ACAS Code points out that the employee's request must be 'reasonable'. It may not be a reasonable request to ask for someone to attend who is based at a remote location when there is someone equally suitable on site. Or it may not be reasonable to ask for a companion to attend whose presence would for some reason prejudice the hearing.

Comment: ACAS's examples need to be treated with some caution. Tribunals are likely to say that whether the employee's request was 'reasonable' is an objective test not simply a question of what the employer decides is reasonable. Employers do sometimes suggest that employees bring along the nearest work colleague or available manager, and such companions are unlikely to be as useful as a fully prepared and committed companion of the employee's choice.

Is a companion or representative necessary?

Employees may find it hard to persuade a work colleague to come with them to the grievance 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 everyone says on those points (see below).

Reasonable adjustments

A disabled worker may be entitled to have a suitable companion attend the grievance hearing with him/her by way of a reasonable adjustment. See p34 for details.

Minutes / Notes of the hearing

As already mentioned, some grievance hearings will have the atmosphere of an informal meeting. Others may take the form of a formal hearing with witnesses. Either way, it is always important to have a good note of the discussion in case issues arise later.

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 sometimes disputes in the employment tribunal about what was said at a grievance 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 companion to take notes, at least of the key points, ie the important points made by the employee; any explanation given 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; any mention by the employer 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 may well 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.

Witnesses

Most grievances do not require witnesses, but in some circumstances they may be important, for example if the grievance is about bullying or harassment.

How evidence from witnesses is presented depends on the type of procedure. Where a full hearing is involved, witnesses may be called to give oral evidence. But where the procedure simply involves a one-to-one meeting between the employee and the person hearing the grievance, the latter may speak to witnesses in private as part of his/her investigation into the grievance.

If the employee would like the procedure to be a bit more open, s/he could ask for his/her witnesses to be called into the meeting and questioned in front of him/her. But the employer may not agree to this.

In appropriate cases, a manager dealing with a grievance should ask the employee whether s/he has any witnesses s/he would like to be interviewed, but this often does not happen. If the employee does have witnesses, s/he should take the initiative and provide a list of names to the manager.

The best thing to do where witnesses are important is to get a written statement from them first and give the statements to the manager hearing the grievance. This ensures the full story is set out before the witness is put under any pressure.

It is often a good idea to get the statements before the employee submits his/her grievance. Once a grievance is submitted, witnesses can get influenced by workplace reactions to it. Also, in some very serious cases, eg concerning sexual harassment, employers often instruct employees not to contact any witnesses once the grievance is lodged. The ostensible ground is to maintain confidentiality or to avoid bias, but it can put the employee in a very weak position if s/he has not yet obtained statements.

It is very important that the employee does not put undue pressure on reluctant witnesses to help out or write statements. Not only will this be counter-productive, the employer could in extreme cases use it as a ground for disciplinary action.

Mediation

What is mediation?

Mediation is a form of dispute resolution. It is where an impartial third party helps people in dispute try to reach an agreement. It can be useful where two employees are in conflict with each other or where there are problems between an employee and his/her line manager. It can cover issues including relationship breakdown, personality clashes, bullying and harassment.

The mediator does not judge the case. S/he simply facilitates those involved to reach their own solution.

Some employers make mediation an optional stage in the grievance procedure, or suggest it takes place before the grievance procedure starts. Others offer mediation as a separate option. In many workplaces, the employers do not offer mediation at all.

Who are the mediators?

Mediators can be internal or external. Some employers have trained and accredited certain staff to act as mediators. More commonly, mediation is done by external organisations. Some of these are in the not-for-profit sector, eg ACAS and the Centre for Effective Dispute Resolution. Others are private companies who must be paid, usually by the employer.

What is the mediation process like?

Mediation is usually carried out face-to-face, though it can in theory take place over the telephone or by e-mail. There are several stages:

- 📌 stage 1: the mediator meets each party separately, listens to their story and asks what they want out of the process.
- 📌 stage 2: the mediator brings the parties together and invites them to put their side of the story without being interrupted.
- 📌 stage 3: the mediator summarises the main areas of agreement and disagreement. The mediator encourages communication and joint problem-solving.
- 📌 stage 4: if an agreement is reached on steps to resolve the conflict, this is written down and a copy is given to each party.

These stages can take anything from less than a day to two or more days. Representatives are usually discouraged, except in a silent support role. The exception might be if the employee had a disability requiring assistance or if English is not his/her first language.

Mediation is confidential and it is intended that nothing said during the mediation can be used in future tribunal cases if it doesn't work out.

When is mediation suitable?

Mediation works best when it is done at a very early stage, before positions become entrenched and working relationships completely break down. It is best used before formal grievance procedures have been started because, once that happens, differences tend to become more adversarial.

ACAS says mediation may not be suitable if

- ✚ it is used by a manager to avoid his/her managerial responsibilities
- ✚ a decision is needed about right and wrong, eg where criminal activity may have been involved
- ✚ the employee has a discrimination or harassment case which s/he wants investigated
- ✚ someone has learning difficulties or mental health problems
- ✚ one side is completely intransigent so using mediation raises unrealistic expectations.

Pros and cons of mediation

The advantage of mediation over a formal grievance procedure is that no one makes a judgment on who is right and who is wrong. The aim is an agreed solution between the parties. This can be good for work relations. It is also helpful where, for one reason or another, the employee is unlikely to get a positive outcome from a grievance. It could be particularly useful where the employee is unhappy about work relations but does not have solid evidence to prove his/her case.

The disadvantage is that some managers may manipulate the process under the cover of confidentiality. Without the protection of a representative and with no formal accountability, an employee could inadvertently make concessions and reach an unsatisfactory agreement. Although mediation is supposed to be voluntary, employees can sometimes be pressurised into going down that route by managers who are trying to avoid making decisions or being held accountable. There is also the risk that what employees say during the process – although officially confidential – will be used against them in an indirect way in the future.

Tribunal cases and judicial mediation

Once an employment tribunal claim has been lodged, eg for unfair dismissal or discrimination, an ACAS conciliation officer is allocated to the case. The ACAS officer offers his/her services free to the parties to help them negotiate a settlement. Such negotiations are off the record and their content is not brought to the tribunal's attention should no settlement be reached and the case go ahead. ACAS's role in tribunal cases is called 'conciliation' and is different from its role in 'non-statutory mediation'.

Tribunals have power to offer 'judicial mediation' in cases which seem suitable, for example discrimination cases where the worker is still in employment. It is purely voluntary whether the parties want to accept. If it takes place, the mediator is a trained employment judge who will not sit on the hearing of the case if the mediation does not achieve a settlement. The problem with judicial mediation is that it takes place at a late stage, by which time relations are damaged and agreement far less likely.

Why Take a Grievance?

Should the employee take out a grievance?

When employees are unhappy about some aspect of their work which they have been unable to resolve informally, they often think about making a written complaint. Before putting pen to paper, they should pause and consider whether this is a good idea and what they are trying to achieve.

Seeking a solution

Employees tend to hope and believe that presenting a grievance will lead to a resolution of their problem. But is that realistic? If a line manager has not solved the matter when approached informally, is s/he any more likely to do so when confronted with a written grievance? If the complaint is about the line manager, is a more senior manager likely to overrule the line manager? Experience suggests that is unusual. Moreover, if a senior manager upholds the grievance against the line manager's wishes, this could lead to problems for the employee with his/her line manager in the future.

Sometimes grievances can lead to some form of solution even if they are not upheld. For example, an employee may complain s/he is bullied by his/her supervisor and request a transfer. The employer may reject the suggestion that there was any bullying but may nevertheless agree to the transfer request.

In anticipation of a future tribunal case

There can be a good reason to take out a grievance even if the employee knows the chances of it solving the workplace problem are slim. For example, if the employee fears s/he may be dismissed in the future, it could be helpful to put in writing his/her version of events now and to be seen to be co-operating or raising issues of concern. The content of the grievance and the way the employer responds may be useful evidence in any future unfair dismissal case.

If the employee feels s/he may have been subjected to discrimination and foresees that s/he may bring a tribunal case for discrimination in the future, it may be important that s/he raised the possibility of discrimination at an earlier stage. (See p32 for grievances and discrimination.)

The effect of the ACAS Code also needs to be taken into account (p8). The Code does seem to expect that employees attempt to resolve workplace problems by means of a grievance. There is a risk that an employee's compensation will be reduced if s/he brings a tribunal case, eg for discrimination, without having brought a related grievance first.

Collective complaints

Another reason to take out a grievance, even if it does not succeed, may be if there is a general problem with a particular manager. If several employees independently raise grievances against that manager over a period of time, the employer may eventually take notice. However, it may be more effective and reduce the employee's risk of victimisation, if all the affected employees write a collective grievance together. This can be hard to arrange in a non-unionised environment.

Parallel to 'without prejudice' negotiations

Less commonly, the reason for taking out a grievance might be as a precursor to or parallel with initiating 'without prejudice' negotiations, possibly involving a financial package to leave. In this situation, the employee wants to negotiate a settlement deal in return for voluntarily leaving the job. Such negotiations are usually off the record. However, an employee may decide to send the employer a grievance at the same time for these reasons:

- 📌 The grievance is 'on the record' even if the negotiations are hidden, so that the employee has some sort of protection if the negotiations fall through, as s/he has put his/her concerns openly in writing before any action is taken against him/her.
- 📌 It gives the employer an incentive to reach a settlement so as to avoid having to go through the grievance procedure. This does not always work, however. Some employers take a very 'purist' approach and once a grievance is initiated, insist on dealing with it properly, even if negotiations are meanwhile carrying on.

Achieving nothing

The downside of taking out a grievance is of course that the employee may achieve nothing but antagonise his/her line manager or more senior management. There are some ways of writing a grievance which are less confrontational than others, but even then, the employee may be seen as a 'difficult' employee because s/he has spoken out.

To be avoided

It is not a good idea for an employee to get into the habit of regularly taking out grievances regarding every small problem at work. The employee will end up with a personnel file full of complaints and may be seen as a trouble-maker by the employer. The impression given to an employment tribunal - should there ever be a tribunal case - could be that the employee is a serial complainer who is inflexible and does not get on with anyone.

Employees need to exercise common sense. Work situations and colleagues are rarely ideal. It is unlikely to achieve anything to keep taking out grievances over minor irritations. If there is a serious ongoing problem, then an employee may be better off being decisive. If the situation is not serious enough to leave and/or take legal action, the employee may be better off letting certain things go.

Checklist when deciding whether to bring a grievance

- 📌 What is the purpose of the grievance?
- 📌 How likely is the grievance to succeed?
- 📌 Even if it does not succeed, is there still a good reason to take the grievance?
- 📌 Whether or not it succeeds, what is the effect of taking a grievance likely to be on future working relations?
- 📌 Is the employee eligible to claim unfair dismissal if it all turns nasty? (In discrimination cases, there is also some protection against victimisation – see p32 – although this is probably less effective than unfair dismissal protection.)
- 📌 What will happen to the employee's working conditions if s/he does not take a grievance?
- 📌 What are the alternatives to taking a grievance?

Writing the Grievance

How to write the grievance

There are several aspects to consider:

- 📌 who should write the grievance
- 📌 the tone and content of the grievance letter
- 📌 how much detail to set out
- 📌 who to address the grievance to
- 📌 what to ask for

Who should write the grievance?

If an employee intends to go through the stages of the grievance procedure, the grievance letter would normally come from him/her, although it may be drafted by his/her legal advisers.

Alternatively, the employee may ask legal advisers to write to the employer on his/her behalf. A letter written by solicitors or an advice agency might just be a single letter to the employer or it may develop into extended correspondence.

It is a question of tactics, whether the employee asks legal advisers to write directly to the employer. A grievance written only by an employee is usually the most attractive option for two reasons:

- 📌 it runs the least risk of upsetting the employer
- 📌 it puts the employer least on its guard.

If there is no realistic hope of a solution and the purpose of the grievance is simply to record the employee's position with a view to future tribunal claims, the advantage of the employee writing his/her own grievance is that the employer may be less careful to disguise its hostile intentions.

On the other hand, a grievance apparently written by the employee is the one most easily ignored by the employer and less effort may be put into a resolution.

It will also be harder to get the employer's full reasoning set out in writing. Employers often prefer not to be pinned down with their reasoning and can insist on giving verbal explanations and responses. If the employee keeps pressing for a written reply, this may eventually have the same impact on the employer as getting lawyers to write to the employer in the first place.

A letter written by a firm of solicitors is inevitably the most confrontational, even if written in a careful and reasonable tone. Employees often believe that a solicitors' letter will frighten the employer and lead to a resolution of the problem or perhaps some sort of settlement. This is not necessarily true. A solicitors' letter may annoy rather than scare employers, and put them on their guard, perhaps causing them to get their own legal advice. Matters can turn legalistic very quickly.

A letter from a voluntary sector agency such as a Citizens Advice Bureau (CAB) can be a middle ground. It usually will not appear as hostile as a solicitors' letter but it may get a better response than an unsupported employee's letter, especially with a small employer who needs to be told about certain statutory rights which the employee may have.

Of course if a CAB or other external advice agency writes to the employer, it must be ready to deal with the response – or lack of response. Dipping in and out does not work very well and makes the employee look as if s/he has been ditched. A CAB adviser needs to think about how much help s/he will be able to offer. Remember that if an employer replies direct to the CAB etc, the latter will be responsible for keeping the client informed.

The employee also needs to be careful about letters written by a voluntary sector organisation associated with discrimination law, eg a disability organisation or a Race Equality Council. Even if the letter does not concern any allegation of discrimination, it may be understood to do so by the employer because of the source of the letter. This could lead to unintended repercussions.

The tone and content of the grievance letter

The tone of the letter will be affected by what the employee thinks s/he can realistically achieve, but it will not be a good idea in any circumstances to be rude, accusatory or hostile. This will antagonise the employer, making a satisfactory solution less likely and risking future working relations. Remember also that the letter may be seen by an employment tribunal in any future case.

The tone and content will obviously be affected by whether the employee thinks s/he has a realistic chance of getting what s/he is asking for. If there is a real chance of getting a request granted, a softly softly approach may be better. On the other hand, too unassertive a letter can achieve nothing and the employee ends up weakening his/her position by having made concessions or not having fully stated his/her case.

The content will also be affected by the nature and complexity of the grievance. Where a small employer is not well-informed of employees' employment rights, it may only be necessary to enclose an official leaflet setting out the relevant right, eg the minimum statutory holiday entitlement. Where the employee suspects the employer knows about the right or does not want to be told, the letter may need to be firmer, reminding an employer not to victimise the employee for pointing out these rights.

Sample letter regarding holidays

We are writing on behalf of your employee, Mr Elani, who has asked our advice regarding his holiday entitlement. We understand that your company has given Mr Elani three weeks' annual holiday entitlement. Under the law, Mr Elani is entitled to a minimum of 5.6 weeks' holidays including bank holidays, which in Mr Elani's case works out at 28 working days. We enclose a leaflet which explains the statutory rules regarding holidays and hope this is of assistance in resolving this issue.

Optional: We should be grateful if you would confirm that Mr Elani will be granted his full 28 days' annual holiday entitlement. We are sure that you would not treat Mr Elani less favourably because he has raised this matter with you and indeed it would be unlawful to do so.

The employee needs to think carefully about how many incidents to raise as a matter of complaint and how many people s/he is complaining about. The danger of accusing too many managers is that it increases damage to work relations; it makes it harder for the grievance to be upheld internally; it makes it harder for the employer or a tribunal to believe so many people are in the wrong; and it can make the employee seem the common factor and therefore the unreasonable one.

How much detail to set out in the grievance

Apart from some rare residual cases where the statutory dispute resolution procedures still apply (see p4), there are no formal rules about how much to put into a grievance statement.

The employee must be sure to comply with the ACAS Code of Practice because otherwise his/her compensation may be reduced by up to 25% if s/he wins any related case. However, all the Code says is that the employee should 'set out the nature of the grievance'. This is vague. Tribunals would expect enough detail to be set out for the employer to understand the nature of the problem and be able to investigate.

Where there is a detailed written grievance procedure, it may be that the procedure states how much information should be set out in the written grievance. Usually, however, it will not be specific.

Obviously the level of detail is greatly affected by the nature of the grievance and how many facts are involved. But the essential dilemma is whether to simply 'headline' the problem, eg 'My manager is bullying me. She imposes unreasonable deadlines and is inconsistent in her criticisms', saving the examples for the grievance meeting, or whether to set out the examples of such behaviour in the letter.

The arguments in favour of a lot of detail are:

- a. It makes a strong initial impression to anyone who reads the document.
- b. There is a clear record of the employee's complaint. The employer cannot say later that the employee did not draw certain points to its attention or omitted to make certain complaints.

- c. This is particularly helpful if the employee is not represented at the grievance hearing.
- d. More detail means there is more chance of convincing the employer that there is a genuine problem to be resolved.
- e. It ensures the employer properly investigates each issue and provides a response to it.
- f. If it ever gets to a case, tribunals would expect all the key issues to be mentioned.
- g. Any crucial verbal remarks or explanations should be mentioned at the outset in case the employee is accused of making them up later. This is particularly important in discrimination cases (see p33).
- h. The discipline of helping the employee write a detailed grievance ensures the employee's adviser gets on top of the case at an early stage and gives better tactical advice.
- i. In a public sector unionised environment with a full grievance hearing, many of these advantages can be covered by providing a very detailed statement by the employee shortly before the grievance hearing. However, the advantage of providing detail at the earlier stage of submitting the grievance is that the employer is likely to respond with an equally detailed statement prior to the hearing.

The arguments against giving too much detail are

- a. It gives management too much opportunity to cover their tracks or move the goal-posts. It is better to catch them off-guard at the grievance hearing.
- b. The employee may commit herself too much to a particular analysis or strategy and leave herself no room to respond to what management say.
- c. The employee may get some facts wrong in the written grievance and may discredit him/herself.
- d. The letter may become over-detailed and confused, both for the employee and for any reader. The employee may lose sight of the wood for the trees. The employer may be able to by-pass the most awkward content and deal with the easier issues.
- e. It is a lot of work for the employee's adviser at an early stage to establish all the details and decide which are the most important.
- f. There may be some awkward aspects of the case which are better not committed to writing.

Conclusion: For most cases, the amount of detail depends on the number of incidents which need to be covered and the number of complaints. Generally, it is important to itemise the key incidents and the key complaints (see sample, p31). Either way, if the grievance makes generalised statements, the employee must be in a position to back them up with examples.

How long after an event can a grievance be written?

There is no legal rule about how long after an event an employee can complain about it. Unless the written grievance procedure specifies such a time-limit, the employer should deal with a grievance whenever it is raised.

It is sensible for employees to take out a grievance fairly soon after the incident which is causing them concern. Otherwise it suggests they do not really care about the matter. Usually what happens is that there is a recent trigger event, but the employee also wants to bring up older matters which can reveal a pattern. There is no reason why this cannot be done as long as the employee does not go so far back in time that no one can remember what happened or it is no longer relevant because managers or circumstances have changed or so many incidents and people are mentioned that it is the employee who sounds unreasonable.

Certain discrimination or harassment cases (see p32) do involve events over a long period, even a few years. As long as the incidents are relevant, and form part of a continuing discriminatory state of affairs, they may all need to be mentioned.

Who to address the grievance to

The grievance procedure usually states who the employee should address the grievance to. If the complaint is about the employee's immediate line manager, s/he should be permitted to go straight to the next level. However, unless it is a very sensitive matter, such as a complaint about bullying, it may well be sensible to start with the line manager. It is likely to upset a manager immediately to go over his/her head and can damage future relations. The immediate manager may also in some circumstances be more flexible. Whereas a higher manager may be anxious not to undermine the authority of the line manager, the latter may be open to negotiation or discussion.

If relations have broken down and it is pointless and even counter-productive to go to the line manager in the first instance, the employee should be allowed to approach a more senior manager at stage 1.

If the employee is anxious that his/her grievance letter may be overlooked or treated with hostility, s/he may wish to ensure Human Resources are involved from the outset by copying them in on the matter. Obviously the action of copying in HR adds a level of formality in itself and may defeat the object if the idea is to make an informal approach to the line manager first. On the other hand, if the line manager is a major problem and acting outside the organisation's own guidelines, it is better that someone else knows about the grievance.

Agency and contracted workers

What happens when an agency worker has concerns about the way s/he is treated by the end-user, ie the organisation where s/he was sent to work? Sometimes agency workers can work for an end-user for a very long time under close control of the end-user's management, with very little involvement from the agency. So who does the worker raise his/her grievance with?

Similarly, workers employed by a private company in a contracted-out service may have problems with the way they are treated by the contracting authority. They could raise these issues with their own employer through their grievance procedure, but their employer is not necessarily in a position to resolve the matter.

Sometimes there are written procedures to cover these situations, but usually there are not. All the employee can do is raise the matter with the agency or his/her own employer, but s/he risks being removed from the placement because of fear of an upset.

This issue tends to come up particularly in the context of discrimination because the end-user or the contracting authority can usually be taken to a tribunal for any discrimination they carry out (see p32).

What to ask for

It is a tactical decision whether to set out in the grievance letter what solution the employee is asking for. Some detailed written procedures ask the employee to spell this out, but others may not.

The advantage of asking for a desired outcome at the outset is that if the request is unthreatening, it may lead to a quicker solution. It lays the groundwork for a grievance meeting to become a negotiation. The employer may accede to the particular request, without admitting any manager has done anything wrong.

The disadvantage is that the employee loses the flexibility to tailor his/her request according to how well the grievance hearing has gone.

Depending on the content of the grievance, an employee could ask for one or more of the following outcomes:

- 📌 A finding / acknowledgement that a particular manager or colleague has acted unreasonably or unfairly or, if relevant, has discriminated.
- 📌 An apology.
- 📌 A reversal of an unacceptable decision, eg regarding when holidays can be taken or regarding use of a car-parking space.
- 📌 A change in working practices, eg a reduced workload.
- 📌 A review of policies and procedures.
- 📌 Transfer to another post.

Apologies and findings of unfair behaviour obviously tend to be harder to obtain than agreements to reverse certain decisions.

Do's and don'ts of grievance letters

Do

- 📌 clearly set out the problem
- 📌 ask for a written reply
- 📌 sound like a generally committed and responsible employee
- 📌 if possible, identify a realistic solution

Don't

- 📌 be rude, accusatory or hostile
- 📌 accuse too many different people of treating the employee badly
- 📌 make trivial complaints, so that the main complaints get hidden and discredited

Sample grievance letter to line manager

I would like to take out a grievance regarding the recent reorganisation of work duties, which has caused me great difficulties. I tried to resolve the problems in informal discussions with you, but we have not managed to agree a solution. I am happy to work under the new systems, but there are two particular problems:

1. We are expected to wash all the sheets by 3 pm. This does not give us enough time with one of the machines broken down and we have been short-staffed in the laundry since May. We need at least one hour extra or otherwise more staff and all the machines need to be working. Nina (the supervisor) shouts at us when we are not ready by 3, which puts everyone under stress and I am sure she feels under pressure too.
2. As I have explained, it is difficult for me to do the heavy duty ironing because of the RSI which I have developed in my shoulder. I believe this is a disability and employers are supposed to make reasonable adjustments under the law. I only spend 10% of my time on ironing and the work could be shared out between other staff. There are plenty of other tasks I could be given at the same time.

I have worked as a housekeeper for the hotel for 10 years. I work hard and I have never had any disciplinary action taken against me. I enjoy my job and I hope we can find a solution to these difficulties.

Sample letter asking reasons for rejected grievance

Thank you for sending me your letter telling me that you have rejected my grievance because it is not feasible to extend the laundry times or reallocate my ironing duties.

It is still not clear to me why these changes cannot be made. I should be grateful if you would let me have a written response setting out all the difficulties which you foresee and the reasons why you have rejected my grievance. This will help me understand your position and also enable me to put forward any relevant suggestions.

I would like to appeal against the decision to reject my grievance and I need to understand the reasons so that I can put forward my appeal properly. Please could you let me have this information this week so I can write a full letter of appeal.

Grievances and discrimination

Under the Equality Act 2010, it is unlawful to discriminate in relation to a number of 'protected characteristics'. These are: gender, gender reassignment, marriage or civil partnership, sexual orientation, race, religion or belief, age and disability.

There are four main kinds of discrimination:

- 📌 Direct discrimination
- 📌 Indirect discrimination
- 📌 Harassment
- 📌 Victimisation.

In relation to disability, there is also

- 📌 Discrimination arising from disability
- 📌 Failure to make reasonable adjustments.

Direct discrimination is where an employer treats a worker less favourably because of a protected characteristic, eg

- 📌 An employer decides not to recruit a worker because he looks too old.
- 📌 An employer issues a black worker with a first written warning for poor time-keeping but fails to warn a white worker whose time-keeping is even worse.

Indirect discrimination is where the employer applies an unjustifiable provision, criterion or practice which puts the worker at a disadvantage and puts others sharing the worker's protected characteristics at a disadvantage, eg

- 📌 An employer unjustifiably refuses a woman's request to work part-time after she has a baby. A requirement to work full-time puts some women at a disadvantage because of childcare requirements.
- 📌 An employer unjustifiably uses last in first out as a redundancy selection criterion. As a result, younger workers, women and black workers find themselves disproportionately selected for redundancy.

It can be justifiable to apply a provision, criterion or practice if the employer proves it is a proportionate means of achieving a legitimate aim.

Harassment occurs where, for a reason related to a protected characteristic, an employer subjects a worker to unwanted conduct 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.

Victimisation is where the worker is subjected to a detriment because s/he has previously complained about discrimination in some way, either on his/her own behalf or on behalf of someone else, eg

- 📌 An employer is made redundant on a false pretext because she had brought a grievance complaining of race discrimination.

Grievances about discrimination

If a worker feels s/he has been discriminated against at work, s/he may choose to bring a tribunal case for discrimination. S/he can bring such a case whether or not s/he is still employed.

It is usually a good idea to bring a grievance before taking any discrimination case because

- 📌 There is a chance of a resolution without the need to bring a tribunal case
- 📌 A tribunal would usually expect a worker to have tried to raise the matter first in a grievance and, under the ACAS Code (see p8), may penalise the worker in compensation if s/he wins the tribunal case but did not ever bring a grievance.

The worker needs to be careful not to miss any tribunal time-limits while bringing a grievance (see p47).

If the worker is treated badly by the employer because the employer does not like it that s/he has brought a discrimination grievance, the worker can bring a claim for victimisation.

Whether to complain about discrimination

When workers are unhappy about their treatment at work and suspect it may be discrimination, they may be uncertain whether to raise a grievance complaining of 'discrimination' or whether simply to mention unfairness. Unfortunately, raising complaints of discrimination tends to upset the employer, but sometimes the worker has no choice.

The worst thing to do is to complain about discrimination but only verbally, so it cannot be proved that the worker did make such a complaint. Then if the worker is victimised, s/he cannot prove it was as a result of mentioning discrimination.

Reasons to mention discrimination if suspected by the worker are:

- 📌 It cannot be investigated and dealt with if it is not mentioned.
- 📌 If things get worse, the worker may be challenged on why s/he didn't mention discrimination earlier, and it will affect his/her credibility.
- 📌 If the situation ends up in an employment tribunal, it may affect compensation if the worker's grievance did not mention his/her core complaint.
- 📌 Once discrimination is on the worker's mind, the worker tends to come out with it at some stage anyway. It is better to be consistent from the outset, as the worker can lose credibility if s/he first mentions discrimination at the grievance hearing or appeal.

Reasons not to mention discrimination are:

- 📌 The worker may upset the employer and get victimised as a result. If the evidence of discrimination is not strong, s/he will have little legal protection if this happens.

If a worker does decide to mention discrimination in his/her grievance, s/he should do so clearly and not fudge the issue by ambiguous wording such as referring to 'bullying' or 'unfair treatment'.

Discriminatory handling of grievances

Sometimes the handling of a grievance is itself discriminatory, eg

- 📌 **Direct discrimination:** A manager rejects a grievance without giving it proper consideration because the grievance is brought by a young worker and the manager tends to think young workers should be seen and not heard. Had the worker been older, the manager would have properly considered it.
- 📌 **Victimisation:** An employer takes 5 months to deal with a grievance about discrimination, whereas usually grievances are handled in a few weeks. This is because the grievance raises issues of discrimination, which the employer tends to avoid facing up to.

It is usually difficult to show the handling of a grievance or the grievance outcome is direct discrimination or victimisation, as opposed to simply unsatisfactory or unfair. It needs clear evidence to bring this type of case.

If the worker does have evidence that the grievance outcome or handling is discriminatory in itself, s/he needs to make this clear in any tribunal claim about the matter. It is important to distinguish a complaint about the grievance from a complaint about the original matter.

Note also that the time-limit for a complaint about mishandling of a grievance or a grievance outcome would be counted from the relevant mishandling or outcome.

For example:

On 15 February, a manager refuses a worker time off to take her child to the dentist. On 20 February, the worker brings a grievance alleging sex discrimination to the head of department. On 3 March, the head of department rejects the grievance, telling the worker that if women want to work, they need to make proper arrangements. The worker's claims would be:

1. Indirect sex discrimination: manager refusing time off to take child to dentist. Time-limit: 14 May.
2. Direct and indirect sex discrimination: comment by head of department and rejection of the grievance. Time-limit: 2 June.

Reasonable adjustments to the grievance process

The worker may be at a disadvantage in participating in the grievance 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 Equality Act 2010.
- 📌 s/he must be disadvantaged by the way the employer is carrying out the grievance 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.

For more detail on the law, evidence and examples regarding who is covered by the definition of 'disability' and what kind of reasonable adjustments should be made, see *Proving disability and reasonable adjustments: a worker's guide to evidence under the DDA* (see Books, guides and websites, p51).

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 meeting/hearing date at the last minute because the worker wakes up with a severe migraine.
- 📌 **worker with photosensitive epilepsy:** holding the grievance meeting/hearing in a room which has natural lighting and not in the usual office which has fluorescent lighting.
- 📌 **worker with learning disabilities or dyslexia:** 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:** arranging for an interpreter throughout the grievance stages.

Grievances about flexible working

Summary of the law on flexible working

Overview

Employees and other workers may need some flexibility in their working hours for a number of reasons, eg

- 📌 to care for children or adult relatives
- 📌 because of the effects of a disability which they have
- 📌 for religious reasons

If the employer refuses to make the needed adjustments, they may have legal rights, particularly using discrimination law.

In addition, there is a very specific statutory procedure whereby eligible employees can formally request flexible working in order to care for children or adult relatives. This 'right to request flexible working' simply gives employees an optional procedure where such a request must be formally considered and responded to. It gives no rights whatsoever to have the flexible working granted.

The right to request flexible working

Employees with at least 26 weeks' continuous service can use a special procedure to request flexible working, eg a change or reduction in hours or working wholly or partially from home.

The purpose must be:

- 📌 to care for the employee's child under 17 (or under 18, if disabled), or
- 📌 to care for certain relatives aged 18 or over (parents, children, grandchildren, siblings, aunts and uncles etc).

'Caring' appears to have a wide meaning and probably includes simply spending more time with the child or relative, as well as practical tasks such as settling a child into a new school, taking a relative to a medical appointment or doing their shopping, baby-sitting etc

The employee must make a written application containing the required information. This must include

- 📌 the flexible working pattern applied for and the date it should come into effect;
- 📌 an explanation of what effect, if any, the employee thinks the proposed change will have on the employer and suggestions as to how the effect may be dealt with.

The employer must hold a meeting to discuss the request within 28 days and provide a written decision. There is a right of appeal within 14 days.

The employer can only refuse the request on one of the specified grounds, but these cover virtually every situation. These are:

- additional costs;
- detrimental effect on ability to meet customer demand;
- inability to recruit additional staff or re-organise work amongst existing staff;
- detrimental impact on quality or performance;
- insufficient work during the periods the employee proposes to work;
- planned structural changes.

The grounds must include a sufficient explanation as to why those grounds apply.

If the employer fails to follow the procedure or refuses for a reason which is not within the listed grounds or gets the facts wrong, the employee can claim compensation up to 8 weeks' pay.

If the employer correctly follows the procedure and refuses the request on one of the specified grounds, the employee has no further legal rights under this procedure. It is important to remember the right to request flexible working is purely a procedural right to have such a request considered. It does not give any right to have that request granted.

Is there a right to be allowed flexible working?

Whether or not employees make use of the statutory right to request flexible working, they may have other legal rights to change their hours or work from home. It is possible, though unlikely, that they will have such rights in their contract of employment. Discrimination law is more likely to be helpful.

For an overview of discrimination law, see pages 32-35. Remember that it applies to all workers and not just employees. There is also no minimum service requirement.

If an employer unjustifiably refuses a woman's request to adjust her hours or work part-time for childcare reasons, this may be unlawful indirect sex discrimination. The woman needs to prove the employer's refusal is putting her at a disadvantage. If so, the employer needs to prove that its refusal is a proportionate means of achieving a legitimate aim.

If an employer unjustifiably refuses a woman's request to adjust her hours or have time off to care for a relative, this is also potentially indirect sex discrimination. The woman needs to prove that such caring duties tend to fall on women.

Potentially it may be indirect age discrimination to refuse an older male or female worker an adjustment of hours to care for relatives. The worker needs to show that such caring duties tended to fall more on those of his/her age group than others. This type of case has not really been tested yet.

If an employer unjustifiably refuses to adjust a religious worker's hours so s/he can attend prayers and/or avoid working on a religious day or holiday, this may be indirect age discrimination. The worker needs to prove that the employer's refusal is putting him/her at a disadvantage. If so, the employer needs to prove that its refusal is a proportionate means of achieving a legitimate aim.

Refusing a disabled worker's request to alter or reduce his/her hours or to allow home-working may amount to a refusal to make reasonable adjustments. The worker needs to prove s/he is put at a disadvantage by the current working hours or location. If so, the employer needs to prove why the proposed adjustment is unreasonable.

Taking a grievance

In any of the above situations, the worker will usually want to request the adjustment to his/her hours or workplace in a low-key friendly way rather than jumping straight to a grievance. If the request is refused, the next step will be to use the grievance procedure.

Where the request is for flexible hours due to childcare or care for adult relatives, it is optional whether an eligible employee just makes an informal request to work flexibly in the usual way or follows the formal 'right to request flexible working' procedure. Because the latter is a recognised procedure, it may be better received by the employer. It may also be more successful, because some employers may feel obliged to grant a request because the procedure exists or because they misunderstand the scope of the procedure.

If an employee does start by using the formal procedure and his/her request is refused, it is optional whether s/he goes on to use the grievance procedure. There is probably only any point in this if it enables him /her to have access to a different and more sympathetic manager or if s/he wants to specifically raise the issue of discrimination, which s/he may not have mentioned during the formal statutory procedure. Otherwise it seems repetitive and excessive to go through a grievance as well as the formal request procedure and it is unlikely a worker would be penalised in compensation in any subsequent tribunal claim if s/he had not done so.

What to put in the grievance letter

The main elements to put in a grievance letter are:

- 📌 set out the changed hours or work arrangements which the worker would like. If the worker indicates a few different options, this may increase the chance of getting an agreement, although on the other hand, the worker may end up with his/her least preferred option.
- 📌 explain why the worker needs to adjust his/her hours or work arrangements.
- 📌 anticipate and address any obvious difficulties which the employer may encounter if it grants the request. The worker could suggest a trial period if the employer has doubts whether the arrangement would work in practice. Obviously this carries the risk that the employer will say 'no' at the end of the trial period and may give the impression that the worker will not press the matter.

If the employer or local manager has already verbally refused the worker's request, or if this is a grievance appeal, the worker should try to get the employer to commit itself on the reason for its refusal. As already discussed (see p25), employers sometimes prefer not to be pinned down. However, if the worker is to have any chance of negotiating a better arrangement, it is important to understand the real nature of the employer's objection. Also, if the employer maintains its refusal and the worker is considering a tribunal case, it is important to be able to assess the strength of the employer's defence.

The worker also needs to decide whether to mention that the employer's refusal may amount to discrimination. This may be something which s/he needs to raise if there has been an initial refusal, but not at an early stage where his/her request might still be granted. The difficulty, as with so many grievances, is whether to go for a gentle persuasive approach or a firm assertive approach. Whether, when and how to raise discrimination in grievances is discussed in more detail at p33.

Sample grievance letter

I am writing to you regarding my request to change my hours from 9 – 5.30 to 10 – 4.30. This is so that I can avoid travelling in peak rush hour. Due to my disability, I find it very hard to stand for prolonged periods on crowded trains. I appreciate this involves working 10 hours less/week. Obviously I would not expect to be paid for those hours. Alternatively, I could make up some of the hours by working half hour lunch breaks. The shop is quiet at each end of the day and I believe the other staff would be able to manage without any difficulty when I am not there. I believe that working half hour lunch breaks would in fact be more helpful, because that is when we are most busy.

I was disappointed that, when we spoke, your first reaction was that such an arrangement would not work. I am therefore raising the matter more formally through the grievance procedure, as this will give us an opportunity to discuss it together more fully. It would be very helpful if you could let me have a note before we meet, setting out your concerns. I can then come prepared to discuss some possible solutions. I look forward to hearing from you.

Optional:

I am sure you are aware that there is a legal requirement on employers to make reasonable adjustments when working arrangements put a disabled worker at a disadvantage.

What if the grievance is unsuccessful?

As in all cases where a grievance is unsuccessful, an employee needs to decide what to do. This includes an assessment of potential legal rights. Where discrimination is a possibility, a worker can make a claim even if s/he remains in the job. Obviously s/he needs to be careful that remaining in the job while bringing a case does not indicate that his/her current hours or working arrangements are not in fact a disadvantage for him/her.

It is unlawful to victimise a worker because s/he complained of discrimination in a grievance or to subject him/her to a detriment because s/he applied for flexible working under the statutory procedure.

Time-limits

Be careful not to miss any time-limits if the employee intends to bring a tribunal claim. If the employee's complaint is for indirect discrimination in respect of the refusal to allow flexible working, the 3 months is counted from the refusal of the request and not from the date of any subsequently rejected grievance about the matter.

In some situations, an employer's ongoing insistence that a job is worked full-time rather than part-time, or on certain days and times, may amount to continuing discrimination, so that the time-limit continues to run (see **Cast v Croydon College** [1998] IRLR 318, CA). This possibility can be difficult to argue and employees should never let more than 3 months pass from the original refusal in reliance on it.

Where an employer fails to make reasonable adjustments for a disabled worker, the 3 months is counted from the employer's refusal to make the relevant adjustment or otherwise, from when a non-discriminatory employer would have made the adjustment. The 3 months is not counted from the outcome of any grievance about the employer's inaction.

Time-limits are explained in greater detail on pages 47-49.

Grievances about the employer imposing contract changes

Summary of the law on contract changes

The contract of employment is made up of many terms and conditions, eg regarding pay, hours, holidays and work location.

In theory, an employer cannot change any contractual terms without the employee's agreement. In practice, it is not so simple.

If the employer attempts to impose a change of contract term without the employee's agreement, this is called 'unilateral variation'. The employee needs to respond. If s/he does nothing, s/he will eventually be taken to have impliedly agreed to the change.

An employee needs to record her objection to the employer's proposed change immediately in writing. This will not preserve his/her legal rights indefinitely, but it will buy some time. The employee then needs to decide whether s/he wants to accept the change or to take legal action, eg

- 📌 resign and claim constructive unfair dismissal
- 📌 refuse to go along with the change and take an unfair dismissal claim if dismissed
- 📌 claim unauthorised deductions from wages (if applicable)
- 📌 claim discrimination (if applicable), whether or not s/he resigns.

The employee needs to be very careful. There is no guarantee s/he will win such tribunal claims or, if s/he does win, that s/he will get much compensation.

If an employee wants to resign over the change:

- 📌 s/he must prove there was a fundamental breach of contract, ie the employee needs to be sure what the true contractual position is, that the contract really is being changed and that the change is serious.
- 📌 s/he must not 'affirm' by waiting too long before resigning. S/he can usually wait until s/he has all the facts, until any negotiation has broken down or any grievance procedure is completed, but then s/he must decide.
- 📌 s/he must not 'jump the gun' by resigning prematurely, eg while an employer is still consulting or negotiating over the proposed change or in the middle of the grievance procedure.
- 📌 even then, a tribunal may say it is a constructive dismissal but not an unfair dismissal.

It is not necessarily unfair for an employer to impose a change of contract or to dismiss an employee for refusing to accept such a change. There is no absolute rule, but the tribunal will consider and weigh up:

- 📌 whether the employer followed fair procedures, eg consulting employees over the change
- 📌 why the employer needs the change, the urgency of the situation, the alternatives, and whether a real benefit can be proved
- 📌 the impact of the change on the employee.

If the change imposed by the employer involves a pay cut and the employee is dismissed after opposing such a pay cut, s/he may be able to claim that s/he was automatically dismissed for asserting a statutory right, ie the right not to have unauthorised deductions from his/her pay. The advantage of such a claim is that it is unnecessary to prove whether or not it was fair in practice. Also an employee requires no minimum length of service to claim. However, employees should not over-rely on making such a claim. It is possible that a tribunal will say the true reason for dismissal was not that the employee complained about unauthorised pay deductions, but that it was in order to change the contract or for some other reason.

Taking a grievance

Rather than rushing to resign or take legal action, an employee should usually first try to deter the employer from going ahead with the proposed change by insisting that the employer has no legal right to change the contract without agreement. If this doesn't work, the employee may want to try to negotiate a compromise.

Instead of starting with a grievance, an employee's initial letter may simply be a straightforward statement that the proposed change is a breach of contract and the employee does not agree to it. If the employer indicates it is going ahead with the change anyway, the employee's next step will often be to take out a grievance.

The advantage of a grievance is that it gives the employee some time to negotiate or attempt to resist the change before having to decide whether to resign. But if the employer will not budge, the employee is still going to have to decide what to do once the whole grievance procedure has been exhausted.

As well as the possible effect on tribunal compensation (see p8), the disadvantage of taking a grievance is that it can take a long time to go through all the stages of the procedure. Once an employee has embarked upon the grievance procedure, s/he cannot usually risk resigning in case it is said s/he has jumped the gun. This can be a real problem where the work situation is intolerable in the meanwhile and the procedure is very drawn out, as can happen particularly in the public sector. It is only in very rare cases that an employee can risk resigning on the basis that a grievance is not being adequately processed (see p4).

A prolonged grievance procedure is less of a problem if the status quo is maintained until its conclusion. The difficulty is where an employer has gone ahead and imposed the change anyway, with the ostensible proviso that the change will be reversed should the grievance succeed. This creates a momentum which makes it unlikely that the grievance will succeed in practice.

Time-limits

Be careful not to miss any tribunal time-limits while going through a grievance procedure. For example, any claim for pay deductions or discrimination could fall out of time while the grievance is being heard.

Time-limits are explained in greater detail on p47 onwards.

What to put in the grievance letter

The tone and content of the letter depends on the employee's bottom line. Is s/he willing to risk losing his/her job over this change? Subject to that, the main elements to put in a grievance letter would be:

- 📌 assert that the proposed change is in fact a change to the employee's contract of employment (assuming this is correct). If uncertain, ask the employer to point out where in the contract it says the employer can make the proposed change.
- 📌 state that contract terms can only be changed by agreement and that the employee does not agree to this change.
- 📌 if the employer still insists on the change, ask why the change is required. If this is asked in the first letter, it could weaken the tone and sound like the employee is willing to negotiate from the outset.
- 📌 if any discrimination is involved, this should usually be mentioned (though see general comments at p33).
- 📌 if the change involves a pay cut, it may be worth stating that the pay cut would be 'an unauthorised deduction' from pay. This gives the employee a chance of claiming automatic unfair dismissal for asserting a statutory right if s/he is sacked as a result of his/her letter.

The employee needs to get the employer to commit itself on the reason for its refusal. As already discussed (see p25), employers sometimes prefer not to be pinned down. However, if the worker wants to try to negotiate a compromise, it is important to understand the real nature of the employer's needs. Also, if the employer maintains its refusal and the worker is considering a tribunal case, it is important to be able to assess the strength of the employer's case.

Sample pre-grievance letter

I am writing about your letter dated 9 August, where you said the company would be withdrawing all petrol allowances from 1 November. I am entitled to a petrol allowance under my contract and I am afraid I cannot agree to this change. If you go ahead with the change, it would be an unauthorised deduction from my pay.

Sample grievance letter

Please take this letter as a grievance regarding the company's failure to pay my petrol allowance last week. I am entitled to be paid this allowance under my contract of employment. If it is not paid to me, I will have no option but to make a claim for an unauthorised deduction from my pay in the employment tribunal. While you are dealing with my grievance, I would expect the status quo to apply and my allowance to be paid through that period. Otherwise it would seem to me that the company has not entered the grievance procedure with an open mind.

Optional in this or a follow up letter: could you please set out for me in a letter why the company finds it necessary to cut allowances at this time.

Grievances about sickness absence

The legal context

An employee may be absent on long-term sick leave for a variety of reasons, eg ill-health, accident or injury, pregnancy-related sickness, or stress or depression caused by personal circumstances or by bullying at work. Sometimes an employer will initiate capability procedures or even disciplinary action regarding the absence. Alternatively, it may be that the employee needs to take out a grievance regarding the arrangements for his/her return to work or concerning workplace actions which have caused the sickness.

If the employee has been sick for a long time, s/he may well meet the definition of a disabled person for the purposes of the Equality Act. To be covered, the employee must have a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out day-to-day activities. This can include depression, if its effects are sufficiently severe and have lasted or are likely to last at least 12 months.

If an employee is disabled, and at a disadvantage as a result – eg s/he is unable to return to work – the employer must make any reasonable adjustments which would remove that disadvantage. For example, changing work arrangements to enable the employee to do his/her job or, if the problem is bullying, removing the work stresses, allowing a phased return to work etc. For more on disability and grievances, see p35 above.

If the employee is not disabled, but nevertheless cannot face work because of workplace stresses, an employer should still address any problems. An employer need not go quite as far to take positive steps if the Equality Act does not apply, but there are still the requirements of unfair dismissal law if the employee were to resign because of mistreatment or be dismissed because of ill-health.

Remember that, to claim disability discrimination, a worker need not be an 'employee' and there is no minimum service requirement. But to claim unfair dismissal, a worker needs to be an 'employee' and to have at least one year's continuous service.

In limited circumstances, s100 of the Employment Rights Act 1996 may also give some protection. Under s100, it is automatically unfair to dismiss an employee for refusing to work in circumstances of danger which s/he reasonably believed to be serious and imminent. This can include, for example, dangers caused by the behaviour of co-workers (see **Harvest Press Ltd v McCaffrey** [1999] IRLR 778, EAT). An employee does not need any minimum service to gain this protection.

Taking a grievance

As with all grievances, the employee needs to decide what tone to adopt. If the employee is sick because of pressure from his/her manager, s/he needs to decide whether it is appropriate – or tactically a good idea – to call this ‘bullying’. Many employees use the term ‘bullying’ very readily, but if the matter ever ends up in a tribunal, it may be seen as an exaggeration, which discredits the employee. It will also antagonise the employer and make a resolution unlikely. On the other hand, there are some circumstances where it is a correct description of what has happened and a more restrained approach solves nothing.

If there is bullying or unfair treatment because of a protected characteristic, then any grievance should clearly mention discrimination if the employee intends to follow up with a tribunal case (see p00 regarding Discrimination and grievances).

Where the employee believes his/her ill-health amounts to a disability, it is probably a good idea to say so. This will make the employer aware of its duty to consider reasonable adjustments. Having said that, sometimes employers disagree that an employee’s condition meets the legal definition. ‘Stress’ is a particular danger area because it may or may not be serious and long-term enough to amount to a disability.

If the employee thinks certain changes to work arrangements or a phased return to work would be helpful, s/he should say so in writing.

It can be awkward if the employee is unsure when s/he will be able to return to work even if changes are made and s/he should discuss the matter with his/her doctor first. Whether taking a grievance or facing capability/disciplinary procedures, employers tend to want to know when an employee is likely to return. It is unwise to say, ‘I don’t know’. Employees should at least set down some kind of marker, if only to give the date of the next specialist appointment.

Tribunal time-limits

The employee may not have any intention of taking a tribunal case when s/he first comes to obtain advice. But the position may change later. It is therefore important always to keep time-limits in mind and warn employees that they exist and how they work.

Tribunal claims are started when the standard tribunal form arrives at the tribunal office. It must arrive within the time-limit. This is called 'lodging' or 'presenting' the claim.

Unfair dismissal time-limits

An unfair dismissal claim must arrive at the tribunal within 3 months of the effective date of termination. This means 3 calendar months less 1 day. For example:

- 📌 EDT = 5 January; time-limit = 4 April of the same year.
- 📌 EDT = 26 September; time-limit = Christmas day.
- 📌 EDT = 30 November; time-limit = 28 February (unless a leap year).

It is irrelevant whether the time-limit falls on a week-end or Bank Holiday. As it is hard to deliver tribunal claims on non-work days or to prove that they have been delivered, it is wise to ensure the claim is received (at the very latest) on the last working day before the deadline.

When is the effective date of termination?

It is crucial to identify the termination date correctly - otherwise the employee may miss a time-limit. The EDT is not necessarily the last day the employee worked, because s/he may have been off sick or taken holiday or been on paid leave ('garden leave'). The best guide is usually the dismissal letter.

These are two different situations:

1. the employee is dismissed with immediate effect and paid, say, four weeks in lieu of notice.
2. the employee is given four weeks' notice, but told s/he does not need to come in to work.

In the first case, the dismissal date is immediate. In the second, it is in four weeks' time.

But some letters are not even clear as between these two situations. Beware ambiguous wording. In such cases, another indicator may be when the employee receives the four weeks' pay – immediately or after the four weeks or on his/her usual monthly pay day? The date on a P45 is also good evidence.

If in doubt, always work from the earlier date when considering time-limits.

What if the claim is late?

The tribunal can allow in a late claim where it was not reasonably practicable for the claim to be presented within the original time-limit.

It is very difficult to convince a tribunal to extend time on this basis. An employee may be able to show that she was physically or mentally incapable of keeping within the original time-limit. Ignorance of the law or of time-limits will only be a basis for a late claim if a reasonable employee would have been similarly ignorant. Given the general availability of advice agencies and information on the internet, this is hard to prove.

It is not a ground for a late claim simply that the employee was awaiting the outcome of a grievance or appeal. This means employees sometimes have to start tribunal claims when their grievance or appeal still has not been heard.

Discrimination time-limits

A discrimination claim must arrive at the tribunal within 3 months of the act of discrimination. As with unfair dismissal claims, this means 3 calendar months less 1 day.

If there are several acts of discrimination, it must arrive within 3 months of the earliest of those, so that they are all in time. This means that the discriminatory actions must be carefully identified.

For example,

if the act of discrimination is a disciplinary warning, 3 months is counted from the date the warning was given. If the employee appeals against the warning, the time-limit remains 3 months from the warning. If the employee's complaint is that the appeal outcome was discriminatory, then the 3 months regarding that complaint is counted from the date of the appeal outcome.

if the act of discrimination is a failed promotion, 3 months is counted from when the employer decides not to promote the employee. If the employee takes out a grievance regarding the failed promotion, the time-limit remains 3 months from the decision not to promote. If the employee's complaint is that the grievance outcome was discriminatory, then the 3 months regarding that complaint is counted from the date of the grievance outcome.

- 📌 decision not to promote – 6 March
- 📌 time-limit to complain that the decision not to promote was discriminatory = 5 June
- 📌 grievance about non-promotion is rejected on 20 April
- 📌 time-limit to complain that the rejection of the grievance was discriminatory = 19 July
- 📌 time-limit to complain both about the non-promotion and about the rejection of the grievance = 5 June

The employee must carefully identify each potential act of discrimination as s/he goes along and make a mental note of the time-limit related to that act.

For comments regarding whether the rejection of a grievance is itself an act of discrimination, see p34.

What if the claim is late?

A tribunal can allow in a late discrimination claim if it is 'just and equitable' to do so. This is not such a strict test as the test for letting in late unfair dismissal claims. But it is still hard to get in a late claim.

The tribunal will consider all factors, not simply why the claim is late and how late it is. It will also consider the relative prejudice to each side of allowing in or refusing to allow in the late claim.

Even with this more generous test for allowing in late claims, it is unlikely to be considered a particularly good reason that the employee was awaiting the outcome of a grievance or an appeal. An employee should never allow a time-limit to be missed for that reason. This means it may be necessary to put in a tribunal claim while a grievance is still unresolved.

Lodging tribunal claims before the grievance or appeal is heard

As explained above, time-limits for both unfair dismissal and discrimination are not extended because the employee is going through a grievance or appeal process. Employees therefore need to lodge their tribunal Claim if they want to preserve their right to go to a tribunal if the grievance or appeal fails. If the grievance/appeal succeeds, the employee can always withdraw the tribunal claim.

Inevitably, the fact that an employee has lodged a tribunal claim will affect how the employer sees the grievance/appeal process. It may antagonise the employer and make matters worse. Or it may make the employer reluctant to make any concessions because they could be used against the employer in the tribunal case. Alternatively, it may encourage an employer to resolve the matter, provided there is an agreement that the tribunal claim will be withdrawn.

It is often a good idea, if the grievance/appeal process is dragging on, to forewarn the employer that a tribunal time-limit is imminent and the employee will be forced to put in a claim to preserve the position if matters are not resolved by that deadline. Psychologically, this is often the optimum time to secure an agreed settlement.

Discrimination Questionnaires

An employee with a potential discrimination case should use the special questionnaire procedure. This enables the employee to gather evidence which is difficult to find elsewhere and can make a huge difference to the employee's chances of success.

A questionnaire is usually written on a standard form, where the employee writes a summary of the relevant incidents and, most importantly, asks the employer a series of relevant questions. The employee must send the form to the employer within strict time-limits. The time-limits depend on whether the form is sent before or after the tribunal case has been started by sending the tribunal claim form to the tribunal.

If the tribunal claim has not yet been started, the employee can send the questionnaire to the employer any time within 3 months of the act of discrimination.

But if the tribunal claim has already been presented, the employee must send the questionnaire to the employer within 28 days of it having been presented.

The employee should not allow these time-limits to be missed, even if s/he is going through a grievance procedure which has not been completed.

If the employee misses the time-limits, s/he needs to ask the tribunal's permission to send in the late form. The tribunal will consider what is fair in the circumstances and whether it will save time and costs at the hearing. The employee can explain if the reason for the delay was an attempt to get as much clarification as possible from a grievance, but the tribunal may not necessarily think this was a good reason.

When is it best to send a questionnaire tactically?

Obviously a questionnaire should be sent within the time-limits already mentioned. But subject to that, there are choices regarding how soon to send a questionnaire.

Tribunals can draw an adverse conclusion if employers don't answer questionnaires within 8 weeks. It is therefore usually best to send a questionnaire as early as possible and well before a case starts. Ideally, the employee will get a reply before the deadline for starting a case and it helps him/her decide whether or not to go ahead with the case. Even if the employee cannot get a reply before the tribunal time-limit, it is still useful to send an early questionnaire. It means the employee will get a reply early on in the running of the case, which greatly helps case preparation.

In some situations, employees prefer to delay sending the questionnaire until they have completed a grievance (assuming they keep to the overall time-limit). For example, an employee may fail in her promotion attempt on 20 May, which gives her until 19 August to lodge a tribunal claim. She also has until 19 August to send the employer a questionnaire (or she can wait until she has lodged her tribunal claim and send the questionnaire within 28 days afterwards). The employee decides to take out a grievance regarding her failed promotion. She can do that soon after 20 May. It will give her the chance to find out more about why she was unsuccessful. Her dilemma is whether to send a questionnaire at the same time or wait for a while. The advantages of dealing with the grievance before sending a questionnaire (if it can be done before 19 August) are that:

- 📌 the employee can obtain a certain amount of information without taking a more formal and confrontational step (serving the questionnaire)
- 📌 her managers may be less on their guard and therefore more truthful in supplying information through a grievance procedure than in answering a questionnaire
- 📌 by getting a certain amount of information first, the employee can make a later questionnaire more focussed on the key points
- 📌 employers often refuse to answer a questionnaire while a grievance is pending. This means the employee has laid her cards on the table at an early stage when the employer is not required to make a similar commitment.

The disadvantage of not sending an early questionnaire is that there will be no opportunity to get a reply before the time-limit for starting a tribunal case.

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

- 📌 **Facing disciplinary action: a guide for employees and their representatives.**
By Tamara Lewis. Practical guide with sample letters, discussing common evidential issues, tactics and other issues when facing disciplinary action. Hard copies available from Central London Law Centre. Pdf can be downloaded from the law centre's website:
www.londonlawcentre.org.uk/publications.html
- 📌 **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)
By Tamara Lewis. 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

Discrimination Questionnaires: How to Use the Questionnaire Procedure in Cases of Discrimination in Employment. By Tamara Lewis.

Published Central London Law Centre. Updated (2009) version available on EHRC website.

Guide to procedure and sample Questionnaires for many situations. On EHRC website, www.equalityhumanrights.com/uploaded_files/questionnaire_guidance_general.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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Guides on line

A pdf of this Guide is available on Central London Law Centre's website at www.londonlawcentre.org.uk For hard copies, telephone the Law Centre and speak to the administrator.

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