

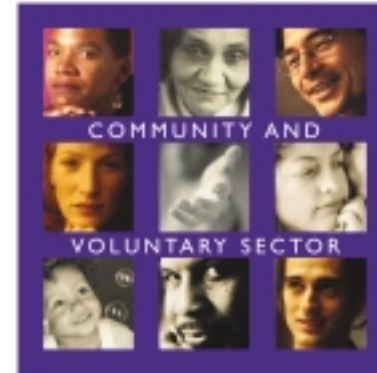
UNISON



The right to be accompanied in the Community and Voluntary Sector **A GUIDE**

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INTRODUCTION

The Employment Relations Act 1999 introduced a new right for workers to be accompanied at a disciplinary or grievance hearing by a trade union representative or a fellow worker. A worker who is 'required or invited' by their employer to attend a disciplinary or grievance hearing has the right to request to be accompanied by a companion. The companion can be either a paid trade union officer, a lay trade union official or a fellow worker. The right to be accompanied has been in place since 4 September 2000.

The right to be accompanied provides branches with an important new tool in organising and representing their members. The law gives UNISON access to workplaces where we are not recognised, and provides an incentive to negotiate good disciplinary and grievance procedures. UNISON has developed new stewards' accreditation and training procedures which will provide an opportunity to strengthen and extend steward networks at branch and workplace level.

THE ACAS CODE OF PRACTICE

ACAS has revised its Code of Practice on Disciplinary and Grievance Procedures in light of the new legislation. The Code outlines best practice and provides a model approach on disciplinary and grievance procedures. It also stresses the importance of maintaining existing representation arrangements with recognised trade unions.

WHO IS COVERED?

All 'workers' are covered by the new law. A 'worker' is defined in the legislation as anyone who performs work personally for someone else, but is not genuinely self-employed. This includes homeworkers, agency workers part-time, temporary and casual workers, those on short-term contracts and those who work overseas.

THE RIGHT

Section 10 of the Employment Relations Act 1999 gives workers the right to be accompanied, where they are 'required' or 'invited' by the employer to attend certain disciplinary or grievance hearings; and where the employee has 'reasonably requested' to be accompanied.

This right is additional to any contractual right the worker might have to be accompanied or represented.

What disciplinary hearings?

The right to be accompanied does not apply to all disciplinary or grievance hearings. The ACAS Code points out that many employers choose to deal with disciplinary problems in the first instance through an informal interview or counselling session. It suggests that it would not be good practice for the worker to be accompanied at this stage. According to the Code, the right to be accompanied applies specifically to hearings where an employer could:

- administer a formal warning to a worker, for example, a warning about conduct or capability that will be placed on a worker's record;
- take some other action regarding a worker, such as suspension without pay, demotion or dismissal;

- confirm a warning issued or some other action already taken, such as an appeal hearing.

What grievance hearings?

The statutory right to be accompanied applies only to grievance hearings which concern 'the performance of a duty by the employer in relation to a worker'. Roughly speaking, this means that you have the right to be accompanied in those hearings dealing with grievances about your employer's legal or contractual obligation to you. This includes:

- grievances that relate to an employer's legal duty in relation to the worker, such as the employer's duty not to discriminate. It would also include an implied duty, for example the duty to take care of a worker's health and safety.
- grievances that relate to the employer's contractual commitments to the worker. Grievances about existing terms and conditions are likely to be covered, but not requests for new terms and conditions.

The ACAS Code admits that the law remains unclear and that, 'only the courts can decide what sort of grievances fall within the statutory definition.' The Code lists examples which provide some guidance.

- Grievances over pay increases would not be covered unless there was a contractual right to pay increases. However, grievances over equal pay would be included, as this is a statutory duty imposed on employers.
- Grievances over car parking would not be covered if the employer did not have a contractual duty to provide parking. But if a worker was disabled and needed parking facilities in order to work, then the employer would have a duty to care. In this case the worker would have the right to be accompanied.
- Grievances arising out of day to day friction between workers would not qualify, unless there were incidents of bullying or harassment involving the employer's duty to care.

While the law limits the range of hearings where workers can ask to be accompanied, there is nothing to prevent the negotiation of a workplace agreement providing the right to be accompanied at a wider range of hearings.

What is a reasonable request?

The request to be accompanied does not have to be in writing, but the law says that it must be 'reasonable'. The ACAS Code does not define 'reasonable', however it suggests that it would not be reasonable:

- to insist on a companion whose presence would prejudice the hearing or who might have a conflict of interest;
- to choose a companion from a geographically remote location, when someone suitably qualified was available on site.

Who can be a companion?

The law says that the worker has the right to be accompanied by a 'single companion'. The choice of companion lies entirely with the worker and is either:

- a paid official of a trade union (regardless of whether the union is recognised or has other members in the workplace);

- a lay representative of a trade union who has experience of or training in acting as a worker's companion at disciplinary or grievance hearings;
- a fellow worker

The Code also points out that workers may have contractual rights to be accompanied by persons other than those listed above.

Do workers have to be companions?

There is no legal obligation on a fellow worker or trade union official to act as a companion, even if the worker is a member of the union. No one can be forced to accompany someone if they do not wish to do so.

What if the companion cannot attend?

If the worker's chosen companion is not available at the time proposed by the employer, the hearing must be rescheduled. The worker is expected to propose a reasonable alternative time no more than five working days from the original hearing date. In proposing an alternative, the worker should consider the availability of the manager and a time and location convenient to other participants.

The ACAS Code states that employers should ensure:

- that a suitable venue is available;
- that arrangements are made to cater for any disability the worker or the companion might have.

Are companions entitled to paid time off?

An employer must give a worker paid time off during working hours to accompany a fellow worker at a hearing. This applies whether or not the companion is a trade union official. The worker has the right to complain to an Employment tribunal if the employer fails to permit time off.

The ACAS Code states that a worker or lay trade union official who has been requested to accompany a worker at a hearing is entitled to take a reasonable amount of paid time off to fulfil this responsibility **so long as they are employed by the same employer.**

A reasonable amount of paid time off should be available for:

- the hearing;
- time for the companion to become familiar with the case;
- time for the companion to confer with the worker before and after the hearing.

Accompanying a worker employed by a different employer

A worker does not have a right to paid time off for accompanying someone employed by a different employer. However, they have the right not to suffer detriment from their own employer, such as downgrading or dismissal. In practice this means that UNISON stewards will have the right to accompany workers employed by employers other than their own, without suffering detriment, though not to be paid for it.

What can a companion do?

The companion does not act in exactly the same way as a representative would. They do not present the case on the worker's behalf. But the ACAS Code explains that companions have an important role to play in supporting a worker, and should, with the agreement of the employer, be allowed to participate as fully as possible in the hearing.

The companion has a statutory right to:

- address the hearing (but not to answer questions on the worker's behalf);
- to confer with the worker privately with the worker, either in the hearing room or outside.

What if the right to be accompanied is violated?

The worker may complain to an industrial tribunal if:

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

Complaints must be presented within three months of failure. If the tribunal finds in favour of the worker, the employer may be liable to pay up to two weeks pay.

Both the worker seeking to be accompanied and the worker chosen to accompany them are protected from detriment and dismissal. As noted above, the companion is protected from retribution by their own employer, even if they accompany someone working for another employer.

It is automatically unfair to dismiss someone for trying to exercise the right to be accompanied. There is no qualifying period for this protection, and it extends to all workers, not just employees. Furthermore, there is no age cut off where the protection ends, unlike most unfair dismissal rights which end when the employee reaches retirement age.

If an employer tries to dismiss a worker under these provisions there is a right to 'interim relief', providing re-instatement or full pay until an employment tribunal hears the full claim.

In addition, an unreasonable refusal to allow an employee to be accompanied to a disciplinary hearing may be used as evidence in any subsequent unfair dismissal proceedings. Tribunals are likely to regard the employer's refusal to allow the worker to be accompanied as resulting in a procedurally unfair dismissal.

INTER-UNION ISSUES

The worker is free to choose an official from any trade union to accompany them at a disciplinary or grievance hearing. However, the ACAS Code suggests that where a trade union is recognised in a workplace, it is good practice for an official from that union to accompany the worker at a hearing.

A new section of the TUC Disputes Principles and Procedures warns that the right to be accompanied should not be used in any way that would undermine existing recognition agreements. 'Where a union is recognised it would be expected that an accompanying representative would normally be provided by the recognised union.'

The TUC notes that a member of a non-recognised union may wish to be accompanied by his or her own union, or a non-recognised union may want to take up the case of an individual who is not in any union. In such situations, the non-recognised union should notify the recognised union that they plan to take up the case.

OPPORTUNITIES FOR UNISON IN THE RIGHT TO BE ACCOMPANIED

Negotiating Grievance and Discipline procedures

The right to be accompanied does not apply where there is no grievance or disciplinary procedure in place, and employers are not obligated to set up such procedures. In order to make effective use of the right to be accompanied, it will be important for branches to establish disciplinary and grievance procedures where they do not exist. It would also be a good time to review existing procedures.

For help in establishing or revising grievance and discipline procedures, you should contact your regional officer. Detailed guidance on what procedures should contain is available in the ACAS Code of Practice on Disciplinary and Grievance Procedures.

It is in the employer's interest to incorporate the right to be accompanied in any new or revised disciplinary and grievance procedure, as it will be unfair without that right.

Training stewards

Privatisation, transfer and contracting out have broken single employers into multiple workplaces. Employers are frequently reluctant to allow their employees to be represented by stewards from outside their own workplace. This creates problems for branches trying to represent members in workplaces that have no stewards of their own.

The new right to be accompanied gives branches an important new tool in organising and representing their members. The person chosen to accompany a worker does not have to be employed by the same employer, and no union recognition is necessary for a worker to ask to be accompanied.

However, the Act requires that trade union representatives providing accompaniment must be 'reasonably certified in writing as having experience of, or as having received training in, acting as a worker's companion at disciplinary or grievance hearings.'

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

ACAS suggests that trained representatives could receive a card or letter stating that they had been certified by the trade union as being capable of fulfilling the role of a worker's companion. The TUC has provided unions with a standard certification letter, which can be customised and used.

Certification

The Trade Union and Labour Relations (Consolidation) Act 1995 (TULR(C)A) makes provision for trade unions to elect officials in workplaces to act as representatives of the union. The Act, in conjunction with the ACAS Code, requires the employer to give reasonable time off to these trade union officials to carry out duties which are concerned with industrial relations, and to undergo training in aspects of industrial relations.

According to legal advice, existing accreditation as a union official under TULR(C)A will not meet the requirements of the Employment Relations Act 1999 (ERA). To be

'reasonably certified' as a worker's companion, the official will have to have had either experience or training in accompaniment at grievance/disciplinary hearings.

UNISON's approach

UNISON has taken the opportunity of the introduction of this new right to review existing arrangements for the accreditation and training of stewards. The union has established its policy following extensive consultation with regions. The main elements of the new policy are as follows:

- All groups of members are encouraged to elect a steward.
- All elected stewards will be accredited under TULR(C)A as previously. This entitles stewards to act as the official UNISON representative in that workplace or department.
- Those existing stewards with experience of accompaniment are issued with a card certifying them under ERA, and those without are encouraged to attend a training course.
- All new stewards are encouraged to attend an introductory training course. Once this is completed they will receive a card notifying them that they are certified under ERA to accompany members at grievance and disciplinary hearings.
- All branches will be encouraged to ensure that new and relatively inexperienced stewards are given support and assistance, and that more experienced branch officers take responsibility for more complex cases.
- In addition, all stewards will be encouraged to attend UNISON's two-day grievance and disciplinary hearing course.

Using the law to get time off for training

Union stewards have the right to paid time off for training relevant to their duties in the workplace. The legal right to time off for training only applies where the union is formally recognised by the employer.

The ACAS Code of Practice on Time Off for Trade Union Duties and Activities highlights the importance of training in equipping trade union stewards with skills and knowledge necessary to carry out their tasks effectively. The Code advises employers to consider releasing trade union stewards for initial training in basic representational skills as soon as possible after their election or appointment. It recommends that additional time off be granted for further training, especially where a steward has special responsibilities and where legislative change requires existing arrangements to be reconsidered.

This means that employers must give stewards adequate paid time off to be trained in accompanying members at grievance and disciplinary hearings. Further, ERA requirements for refresher training mean that employers must agree to paid time off for this too.

Stewards are expected to give employers adequate notice of training courses to allow them to provide cover. If employers refuse time off for training, stewards should contact their branch or regional officer for further assistance.

Strengthening stewards networks

This new accreditation and training process is as an opportunity to strengthen and extend steward networks at branch and workplace level. UNISON is setting up support mechanisms to help identify and train stewards in newly organised workplaces.

Branches should also consider where the ability to accompany a worker in a non-recognised workplace could provide an organising opportunity. For example, Wales Electricity and Water branch produced a new recruitment leaflet aimed at agency staff. The leaflet explained that agency staff had new rights to be represented by a trade union officer at disciplinary and grievance hearings. While making sure that agency workers knew their rights, the branch encouraged them to join the union. Members working in the community & voluntary sector may want to try a similar approach.

A UNISON member working on night shift in a voluntary organisation was experiencing difficulties at work on a variety of issues, including health and safety and communication with management.

A meeting was held for all night shift workers where it was explained that, although there was no formal recognition agreement, UNISON could represent them as a group and raise all of their concerns with management via the employer's grievance procedure. By acting as a group, no one individual would be singled out, and as all workers were experiencing the same difficulties, any improvements would be beneficial to all night shift staff. Management agreed to hearing a group grievance. A meeting was held where all issues were discussed and agreement was reached on actions to be taken.

By being seen to get results, UNISON was able to recruit, not only the night shift workers, but other staff working for the same employer. The positive approach to the employer on this issue also led to a better working relationship with management.

The right to be accompanied can also be used to push for time off for stewards—both for training and representation—in recognition agreements. Separate advice is available in *Negotiating Recognition Agreements in the Community & Voluntary Sector*. A guide is enclosed in this pack.

REFERENCES

Statutory Recognition in the Community & Voluntary Sector: A guide.
UNISON August 2001

Negotiating Recognition Agreements in the Community & Voluntary Sector: A guide.
UNISON September 2001

Both the above items available in the *Community and Voluntary Sector Resource Pack*.
(Contact your branch secretary in the first instance.)

Or by calling UNISONdirect, 0800 5 97 97 50. Opening hours weekdays 6am to midnight and Saturday 9am to 4pm. Email to direct@unison.co.uk.

Code of Practice on Disciplinary and Grievance Procedures, Advisory Conciliation and Arbitration Service, September 2000-10-16, PO Box 276, London SW8 5DT
Tel: 0207 873 0011. www.acas.org.uk.

Taking Your Time, UNISON guide to time off and trade union facilities.
UNISON stock number 1608. www.unison.org.uk.

The Employment Relations Act 1999—a guide for trade unionists, November 1999, Labour Research Department, 78 Blackfriars Road, London SE1 8HF.
Tel: 020 7928 3649. website: www.lrd.org.uk

Disciplinary and grievance procedures—a guide to the new law, September 2000, Labour Research Department, 78 Blackfriars Road, London SE1 8HF.
Tel: 020 7928 3649. website: www.lrd.org.uk

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