

Handling Employee Complaints and Grievances

An introduction

T.P. Geater



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HANDLING EMPLOYEE COMPLAINTS AND GRIEVANCES

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ABOUT THE AUTHOR



Terry Geater has a thirty-seven year background of work in the public and not-for-profit sectors, as well as some exposure to the private sector, having specialised for much of that time in personnel/human resources work. His experience of the personnel/human resources field is extensive, having at different times of his career undertaken and managed

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- the procurement process, including TUPE transfers
- redundancy management
- employment Tribunal preparation
- learning and development, including designing, delivering and monitoring learning and development activity
- job evaluation
- payroll administration
- the strategic planning process
- the Investors in People standard
- the EFQM Excellence Model
- the Clinical Governance approach to healthcare
- the Balanced Scorecard
- change Management, including organisational design and redesign
- independent Workplace Mediation
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INTRODUCTION

One of the requirements placed on employers in terms of their duty to their employees at the commencement of employmentⁱ is to provide details of “a person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his employment”.ⁱⁱ

Although it is but one of several requirements placed on employers, the legislation clearly highlights this important aspect of the employer/employee relationship.

In addressing this prominent element of workplace practice, this book will provide a comprehensive introduction to all aspects of handling employee grievances or complaints, which, for ease of reference, will be referred to throughout as grievances, as this is the term generally used, although a number of other terms are utilised in various workplaces.

The primary focus of the book will be to present issues so as to assist operational managers, who are the key people in an organisation in handling, managing and responding to employee grievances, albeit, that where it is important to do so, it will also deal with the role played by human resources specialists in supporting their operational colleagues.

Section 1 of the book will define the term grievance so that readers have an understanding of it and the breadth of issues that can be covered by it.

The next section will then provide information about the role of the Advisory, Conciliation and Arbitration Service (ACAS) and particularly its role in providing a *Code of Practice* on the management and handling of employee grievances and numerous other documentation to assist both employers and employees in relation to this key aspect of workplace activity, discussing and analysing the advice and guidance and endeavouring to consider an holistic approach to the guidance and advice from these diverse sources.

Section 3 of the book will address itself to the issue of writing and embedding grievance policy and procedure in the workplace. Included in this section will be whether it is necessary for organisations to write their own policy and procedure or to rely upon ACAS for a model process, including the advantages and disadvantages of adopting either approach. Details will be provided about “do’s and don’ts” regarding writing and putting in place employer-specific policy and procedure, the suggested content of such documentation, as well as steps that might be taken to supplement the policy and procedure, so as to enable operational managers to undertake their duties and responsibilities within it.

The next section of the book will discuss the role and place of workplace mediation. Following a definition of terms, the section will discuss:

- A brief history of workplace mediation and how it has come to a more prominent place in the workplace.
- The advantages and disadvantages of adopting workplace mediation.
- Some prerequisites for its use.
- Utilising workplace mediation as an alternative dispute resolution mechanism *per se* and/or;
- Embedding such an approach as an integral part of any policy and procedure put in place by employers to respond to and handle and manage employee grievances, with greater detail being provided about the former.
- The steps that I take to inform potential participants about workplace mediation.

In order to come to an appropriate conclusion about the validity or otherwise of an employee grievance and the extent to which it is either considered upheld or not, it is necessary to undertake “any necessary investigations to establish the facts of the case”ⁱⁱⁱ of the matters, examining relevant documentation and interviewing the person submitting the grievance, those against whom the grievance is directed, as well as other witnesses. Section 5 will cover the relevant issues here and seek to give guidance and advice on conducting such an investigation, heavily utilising specific material produced by ACAS and commenting on and supplementing the guidance and advice where this is considered necessary.

The next section will deal with the stage following investigation, making an assumption that it has not proved possible to deal with the matter informally, that is, either meeting with the employee raising the grievance or holding a hearing. The meetings or hearings will cover various stages, such as the initial meeting or hearing, a subsequent one, representing an appeal against the first one, which exists under some employer-specific policies and procedure and the second or final meeting or hearing, dependent on the stages included in the relevant policy and procedure. The final stage meeting or hearing, or second one, dependent on policy and procedure content, will usually represent the appeal against any decision taken in relation to the grievance and represents the final stage, at least in relation to the decision internal to the organisation.

Section 6 will cover key issues for appropriately managing and implementing policy and procedure, including the following:

- Reemphasis of the importance of compliance with the ACAS *Code of Practice*.
- The importance of complying with the organisations’ own policies and procedures.
- The centrality of timeliness in addressing grievances.

- The right to be accompanied – (a) who may accompany (b) the role of the person accompanying (c) some exceptions to the rule – people being accompanied by parents, carers or advocates (d) whether to restrict it to the person taking out the grievance or expand it outside of these parameters.
- What needs to be disclosed to the person or person(s) against whom a grievance is raised.
- Witnesses – their responsibilities to the employer.
- The standard of proof required in reaching conclusions.
- Grievances and Disciplinary – the crossover – what happens when an employee submits a grievance when s/he is under investigation for a disciplinary matter and the options available to the employer.
- “Collective” grievances – whether or not these should be dealt with.
- Malicious claims under Grievance policy and procedure.

As well as the traditional conclusion to the book, both web and other additional resources will be provided at the end.

1 EMPLOYEE GRIEVANCES – A DEFINITION AND THE CENTRALITY OF MANAGING GRIEVANCES FOR THE MAINTENANCE OF THE EMPLOYER/EMPLOYEE RELATIONSHIP

1.1 Definitions

1.1.1 ACAS provides a succinct definition of the term grievances:

“Grievances are concerns, problems or complaints raised by a staff member with management. Anybody may at some time have problems or concerns with their working conditions or relationships with colleagues that they wish to raise.”^{iv}

albeit far more information is provided on the nature of such grievances in its publication *Discipline and grievances at work – An ACAS Guide*, which is discussed in Section 2.

1.1.2 The Citizens Advice Bureau (CAB), who “provide the advice people need for the problems they face and improve the policies and practices that affect people’s lives”^{vi}, provides some more detail in defining the term:

“If you have a concern, problem or complaint at work, you might want to take this up with your employer. This is called raising a grievance. You might want to raise a grievance about things like:

- things you are being asked to do as part of your job
- the terms and conditions of your employment contract, for example, your pay, the way you’re being treated at work, for example, if you’re not given a promotion when you think you should be
- discrimination at work. For example, you might think your work colleagues are bullying you because you because of your race, age, disability or sexuality.”^{vii}

- 1.1.3 One of the largest trades unions, with a membership said to be at the 1.3m level, writes of grievances in the following terms:

“You can raise a grievance with your employer when you have concerns about any aspect of your working life. You can also use the grievance process to raise issues relating to the terms and conditions of your employment. You should always try to resolve disputes informally before raising a formal grievance and a number of grievance procedures allow for this as the first stage of the process.

Grievances typically cover the following areas:

- pay and working conditions;
- terms of employment and workplace rules;
- disagreements with co-workers;
- allegations of unfair treatment at work.”^{viii}

1.2 The Centrality of Grievance Handling in the Employer/Employee Relationship

- 1.2.1 It is clear that the remit for the handling and management of employee grievances stretches across every aspect of the employer/employee relationship. Given that fact, it is important that grievances are treated in a manner commensurate with that fact.

2 ACAS AND ACAS GUIDANCE

"Acas...provides free and impartial information and advice to employers and employees on all aspects of workplace relations and employment law. We support good relationships between employers and employees which underpin business success. But when things go wrong we help by providing conciliation to resolve workplace problems.

We also provide good value, high quality training and tailored advice to employers. Our expertise is based on millions of contacts with employers and employees each year and we are governed by an [independent Council, including representatives of employer and employee organisations and employment experts.](#)"

Source: ACAS website - <http://www.acas.org.uk/index.aspx?articleid=1342>

2.1 ACAS Code of Practice 1 – Code of Practice on Disciplinary and Grievance Procedures

2.1.1 ACAS provides both a specific Code of Practice – *Code of Practice 1 – Code of Practice on Disciplinary and Grievance Procedures*, as well as a number of other publications of use to employers and employees when dealing with employee grievances.

2.1.2 It is very important to note that the Code of Practice is central to the handling and management of employee grievances, not only because it represents practical guidance and advice, but, as importantly, because of the consequences of not following its provisions.

2.1.3 The *Code of Practice*, amongst others, derives from the Trade Union and Labour Relations (Consolidation) Act, 1992 and sets out the aim and objective of such documentation:

"ACAS may issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the improvement of industrial relations"^{ix}

2.1.4 Do employers, though, have to adhere to its provisions?

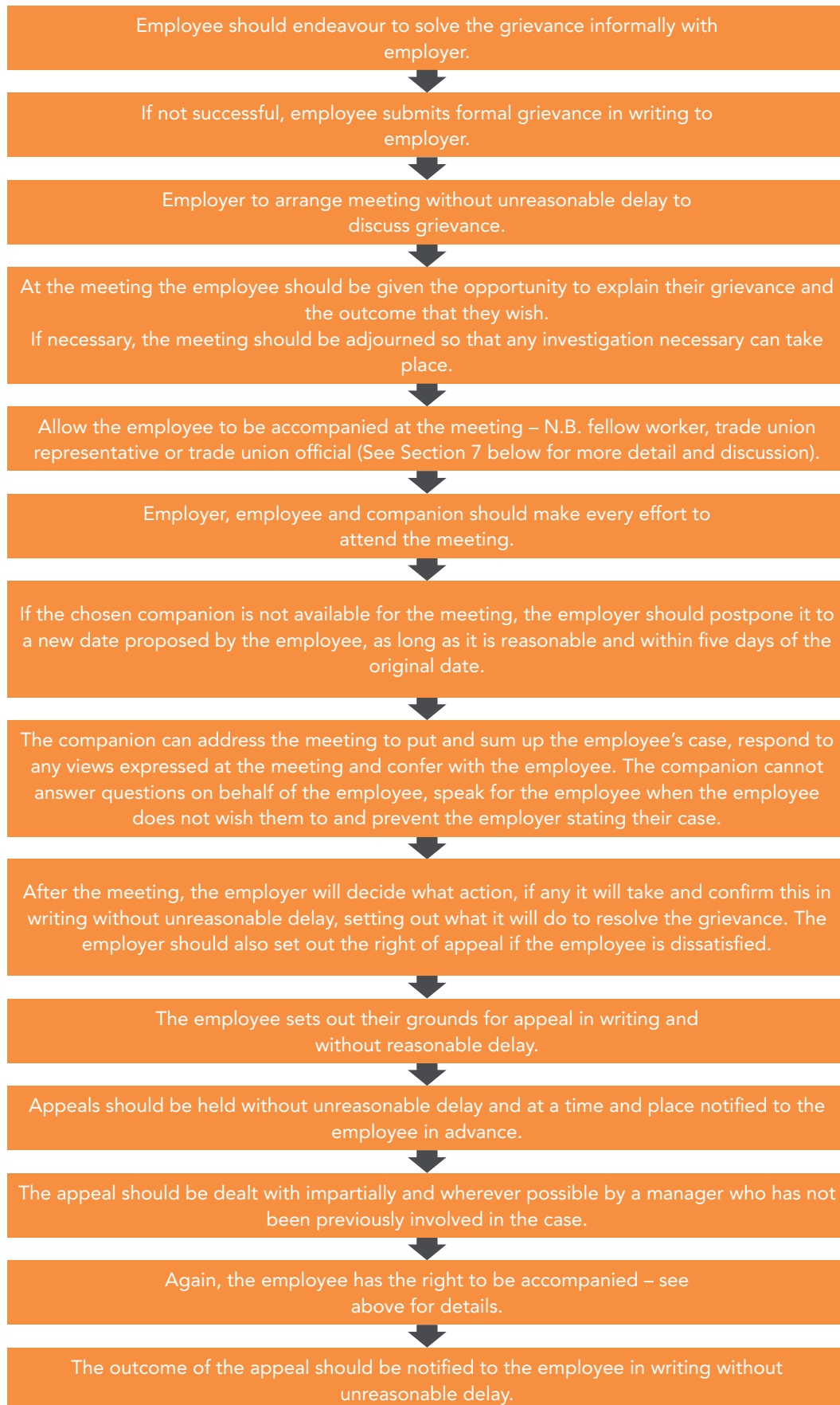
As ACAS makes clear:

“A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. 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 per cent. 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 per cent.”^x

2.1.5 So then, an employer who makes a conscious choice not to follow the Code of Practice risks financial sanctions over and above any substantive award made through the Employment Tribunal route. Perhaps, as importantly, reputational issues are likely to arise generally and specifically because of the public nature, in the main, of the operation of the Employment Tribunal system, the primary legal forum of first instance for dealing with workplace disputes.

2.1.6 Having stated that, it is important to note there are those employers, particularly those whose resources do not encompass having either specialist assistance in-house or ready access to employee relations or human resources or legal specialists/experts, who may well fall into error through lack of experience or ignorance of what for them might well be a one-off event, rather than through a conscious approach not to comply. This book, in highlighting the available documentation from ACAS and in addressing the key areas of activity in employee grievance handling and management, seeks to meet a knowledge gap and to aid compliance.

2.1.7 The *Code of Practice* sets out in a matter of three pages what employees and employers should do in submitting and responding to employee grievances,^{xi} which is reproduced below in simplified graphical format:



- 2.1.8 In effect, then, the process set out in the *Code of Practice* can be termed almost a default procedure for employees and employers to deal with grievance matters.
- 2.1.9 As will be noted, there is little detail in the process set out by ACAS here, but employers are greatly assisted by a further publication – *Discipline and grievances at work - The ACAS Guide*.^{xii}
- 2.1.10 This *Guide* does not have the same status as the *Code of Practice* and therefore there is no compulsion in following its provisions, nor will failure to follow its guidance and advice present the same challenges as a failure to comply with the Code, as detailed above.
- 2.1.11 Having written that, though, it provides useful expansion on the main elements of the process and seeks to provide all employers with good practice advice.
- 2.1.12 Its key elements are as follows:
- o informal resolution of grievances is recommended as an initial approach
 - o an outside independent mediator could be used. There are two points of note here. The emphasis at such an early stage on the potential use of workplace mediation and the emphasis on “outside”, independent mediators, which seems to preclude the use of internal mediators, this, despite the fact that ACAS specifically provides learning and development interventions for just such internal mediators. See Section 6 for a discussion of the merits and demerits of using both internal and external mediators.
 - o A definition of and a description of the nature of workplace grievances.

- o The importance of providing learning and development interventions for managers (and employee representatives, including trade union representatives) around handling grievances. It is very important to note this guidance is emphasising the key role of operational managers in the implementation and management of employee grievances. Whilst internal human resources specialists and external investigators are sometimes deployed to undertake investigations, these deployments tend to be the exception rather than the rule, with the vast majority of grievances being left to operational managers to deal with. The reality is that most operational managers, particularly those first line managers in larger organisations, are unlikely to have to deal with a large number of grievances and it is therefore vitally important that they are provided with learning and development interventions to ensure that they are able to positively respond to this aspect of their management role. Another point that also needs to be emphasised is the need to provide such learning and development opportunities on a rolling basis, so that newer managers have the opportunity to upskill themselves and managers who received such learning and development previously have an opportunity to update their skills and aptitudes in this area of activity. Some organisations and the managers within them may balk at the idea of undertaking joint learning and development with employee or trade union representatives, given the adversarial nature of employee relations in some organisations, as the two “sides” are traditionally thought to have different priorities in these matters. Equally, some advantage could accrue both from the opportunity to learn about the different perspectives and from the fact that each “side” is undertaking the same learning and development and might therefore be considered to be starting from the same initial point. Trades union representatives and officials do often have access to trade union sponsored learning and development events in relation to grievance handling and therefore it might not be considered necessary to provide joint learning and development interventions. Additionally, trades union representatives at a local level and trade union officials tend to gain more experience than their operational management colleagues purely due to the fact that they are called upon to deal with these matters more regularly than first line, and indeed, more senior managers. Irrespective of the approach taken, what cannot be denied is that operational managers should not be left to cope with managing this important aspect of their role by simple provision of the policy and procedure, sometimes supplemented in larger organisations by guidance notes.
- o The importance of record-keeping, including:
 - the nature of the grievance
 - what was decided and actions taken
 - the reason for the actions
 - whether an appeal was lodged
 - the outcome of the appeal
 - any subsequent developments.

- o The importance of maintaining the confidentiality of such records and only retaining them for as long as it is necessary, in accordance with Data Protection Act 1998. It is important to remember that there is the right to have access to certain data taken into consideration in relation to what is recorded and how long it is kept for.
- o Copies of records, including notes or minutes taken should be provided to the employee – in order to protect witnesses it may be appropriate to redact certain of the records.
- o The guidance that follows on from this seeks to supplement the default process set down in the *Code of Practice*. Of note here, ACAS sets down what they consider to be a reasonable timescale for the meeting following the submission of a grievance – “ideally five working days”^{xiii}.
- o Practical advice is also included with respect to the approach the person who is meeting with the employee should take – which will be discussed in greater detail in Section 5 below.
- o Under a section dealing with grievances by employees against a fellow employee, again the question of potential mediation arises, as well as a reminder that the approach to that other employee needs to be carefully handled and managed generally and specifically so that the need for that person to be accompanied does not arise. By implication, the guidance appears to impress upon employers that they do not turn what should be an enquiry into a matter that has arisen in order to determine its validity or otherwise or the extent of its validity, into a disciplinary meeting or investigation. Only after an investigation of a grievance will a reasonable employer be able to determine whether or not the grievance is upheld or partially upheld and whether or not there is a potential to subject the employee (or manager, where the grievance is directed against a manager) to investigation under the organisations’ disciplinary or conduct process. In effect, employers are being reminded that they should not be making any assumptions until the process is followed appropriately.
- o Again the question of the right to be accompanied is addressed, as detailed above (See Section 7 below for greater detail and discussion).
- o The practice to be followed in deciding what action is to be taken once the grievance meeting has taken place and giving the right to an employee to appeal a decision and the action to be followed (See Section 5 below for greater detail and discussion).
- o A reference to “special cases” is made in the closing part of the guidance, with ACAS indicating that employers may wish to consider dealing with such matters as bullying and harassment and whistleblowing using separate procedures and providing links to these subjects on their website.

- o ACAS notes that confidentiality is of “prime importance”, but indicates that where the outcome of a grievance leads to disciplinary action, specifically here in relation to bullying and harassment, this action may need to be made known, although no rationale is provided for treating these situations any differently to other non-bullying and harassment matters, nor is the extent to which these matters need to be made known, i.e. simply to the person taking out the grievance or more widely, neither of which suggestions appear to be as helpful as they could be.
- o In closing, mediation is again mentioned, although restricted to dealing with bullying and harassment matters. ACAS proposes that mediation “may be particularly useful in these types of cases”.

2.1.13 In addition to the useful information to be found in the *Code of Practice* itself, as well as in the *Discipline and grievance at work – An Acas guide*, as will be noted in the Section 9 below, ACAS has produced extremely helpful guidance^{xiv} in relation to investigations, as well as resources, such as a pro-forma plan for investigations, an investigation template as well as some suggested pro-forma correspondence. This will be further explored and discussed in Section 4 below.

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3 EMPLOYEE GRIEVANCES POLICY AND PROCEDURE

- 3.1 Whilst, as already stated, it is a compulsory element of the statement of employment conditions that employees are informed of the name of a person to whom they should address complaints regarding their employment with a view to seeking redress, there is no specific requirement to have a grievance policy and procedure in place.
- 3.2 Given the centrality of this aspect of the employment relationship and the need to have some provision in place to manage it, there appears to be two approaches that can be adopted:
- a) indicate that the “model” set out in the *ACAS Code of Practice* will be utilised and go no further or notify the adoption of it, but amend it, to reflect to whom such grievances should be addressed, for instance, a direct line manager or their manager in circumstances where they are the subject of the grievance, as well as those to whom “appeals” should be addressed; or
 - b) write and implement an organisation-specific grievance policy and procedure, which would reflect the additional information in the preceding paragraph and go on to deal with such issues as defining what “unreasonable” delay means in reality, i.e. that a response should be sent no later than five or ten working days, as an example, expand upon what “appropriate action” might mean, including, for instance, that there is a possibility that the disciplinary process might be invoked if a grievance is partly or fully upheld and alleged misconduct has been found and other such terms which are not defined or fully spelt out.
- 3.3 There is no reason why any organisation, irrespective of size or complexity should not adopt the approach in (a) above, although it is likely to be the “best fit” for a smaller or less complex organisation.
- 3.4 In addressing the second approach there are a number of “do’s and don’ts” that ought to be taken into account

Do's
• Ensure that the policy and procedure is fully compliant with the <i>Code of Practice</i>. • Ensure that the best practice suggestions included in ACAS guidance are incorporated. • Ensure that the policy is clearly written and that it is not ambiguous, to the extent to which ambiguity can be excluded. • Ensure that it is accessible to those who will use it, for employees and managers and other stakeholders. • Differentiate policy and procedure. • Ensure that you differentiate between what must be done and others issues where there is flexibility. • Include roles and responsibilities and emphasise to whom these pertain and that they are responsible and accountable for these, particularly note that the policy and procedure will be implemented by managers, who may seek guidance and advice from human resources specialists (where these are present). • Emphasise that timeliness is of the essence in dealing with the management of grievances. • Set realistic timescales to ensure that matters are dealt with within a reasonable timespan. • Consider using a number of styles to deliver the objective – not just text, but flow charts, other graphical representations etc. • Provide practical resources either as part of the documentation or, more realistically, separately, including pro-forma letters, a pro-forma plan, templates for reports etc. • If it is to be web or intranet enabled ensure that it is straightforward to navigate • Ensure that reference is made from whom guidance and advice can be sought and obtained. • Ensure that it readily available and accessible – via the web or intranet, from line managers, the Human Resources Department etc. • Ensure that the documentation is regularly reviewed and changed in the light of legislation, the ACAS <i>Code of Practice</i>, other documentation, current best practice guidance and experience of using it, i.e. “lessons learnt” from its implementation and use. • Seek the views of a wide range of stakeholders when documentation is drafted and before publication to ensure that the material is fit for purpose from their various perspectives. • Engage with recognised trades unions or employee representatives with a view to consulting these stakeholders, obtaining their agreement to the documentation, listen to feedback and amend in the light of that feedback, if it is acceptable, but implement, even where that agreement is not forthcoming.

Don'ts
• "Gold plate" what ACAS has included, a tendency found in many public sector policies and procedures – there is no need to do so as the essentials are in the <i>Code of Practice</i> and there is only a need to expand where it is not clear. • Make the policy and procedure too complex to understand and use or manage. • Make the process cumbersome – keep the informal stage, one formal stage and one appeal stage and don't add in additional stages, e.g. a second formal stage to allow appeal from the first and then add in an appeal from the second formal stage. • Put unrealistic timescales in place, whilst making sure that timely interventions and timely responses are key to its implementation.

3.5 The following represents suggested content for grievance policy and procedure documentation specifically written for an employer and explores some of the issues involved.

3.5.1 Introduction

- a) *Organisational requirement* – that all employees treat each other reasonably and with respect.
- b) *Purpose* – Why is the policy and procedure in place – to facilitate the resolution of workplace disputes, preferably informally or, if unsuccessful, using its formal process.
- c) *Compliance* – ensure that it is and then state that the policy and procedure is in full compliance with the ACAS Code of Practice and that managers must ensure that they comply with the procedure in full, in terms of, for example dealing with matters on a timely basis, complying with deadlines and notification requirements etc.
- d) *Other Policies and Procedures* – make clear where there are other policies and procedures that are relevant, e.g. the Disciplinary Policy and Procedure may be invoked in certain circumstances, bullying and harassment will be dealt with if there is not separate provision, where appeals exist in other policies and procedures, the Grievance Policy and Procedure cannot be used.

3.5.2 To whom does the policy apply?

- Are there separate policies and procedures for different employees, i.e. senior managers, the Chief Executive, which excludes them from the current policy and procedure?

- Do different parts of the business or different work units have separate policy and procedure which excludes them from the current policy and procedure?
- Agency workers are excluded – they will be referred back to their agency – where appropriate, the employer will co-operate with their investigations and will work jointly with them if the situation warrants this.
- Consultant and interim staff are not subject to the provisions of this policy and procedure.

3.5.3 Definition of a Grievance

See Section 1 above for details.

3.5.4 Exclusions from the Policy and Procedure

- Dismissals – these will be dealt with under the Disciplinary/Capability or Attendance Management policies and procedures, as appropriate.
- Collective grievances – these will be dealt with via separate mechanisms for dealing with collective matters by recognised trades unions, employee representatives or, in the absence of such provision, the current policy and procedure will be used, using one representative of the group of workers.
- Matters over which the employer has no control, e.g. the allocation of tax codes (unless the provision of information by the employer to HMRC led to the error).
- Grievances against former employees.
- Grievances received after employment has ended.

3.5.5 Time Restrictions on Submission of Grievances

- a) The employer will only deal with grievances in relation to concerns or matters or incidents that occurred less than **three months** [or some other reasonable timescale that the employer adopts] previously.
- b) The employer will consider dealing with grievances older than this where the employee can demonstrate that they are alleging a course of action, on the grounds of a protected characteristic or more than one, the latest of which fell within the three month timescale.

3.5.6 Mediation

- Provide a definition of what mediation is and its purpose.
- Commit to using mediation at any stage of the process.
- State whether in-house mediators will be used or external ones.

3.5.7 **Grievance and Discipline policies and procedures**

Explain what could happen if a grievance is raised during the course of a case under the disciplinary (or capability or attendance management) policies – using the guidance provided in the *ACAS Code of Practice*.

3.5.8 **Abuse of the Grievance Policy and Procedure**

- Abuse of the policy and procedure will not be tolerated.
- If it is determined that malicious or vexatious grievances have been submitted, the person doing so may be subject to investigation and, as appropriate, action within the employer's disciplinary policy and procedure.

3.5.9 **Witnesses**

All employees are expected to fully co-operate and positively engage with the investigation and hearing of grievance cases, including attending interviews, providing witness statements etc.

3.5.10 **The right to be accompanied**

- a) Employees required to attend formal meetings under this policy and procedure will have the right to be accompanied in compliance with the *ACAS Code of Practice*, i.e. the person concerned can be accompanied by a trade union representative or official or a fellow worker of their choice, the attendance of whom it is the responsibility of the employee to arrange.
- b) Additionally, where the employer is required to make reasonable adjustments under the Equality Act, 2010, it will positively consider such adjustments, conditional on it being informed that they are necessary.

3.5.11 **Confidentiality**

Employees must maintain confidentiality when involved in a grievance process. Information is only to be shared with those managing the grievance or with the employee's representative.

3.5.12 Grievance Process

- The first priority of the policy, if the matter cannot be resolved by early mediation, is to endeavour to deal with the matter informally. Only after this has been attempted, except in those wholly exceptional circumstances where the matter is so serious it can only be dealt with formally, will the formal part of the policy and procedure be used.
- Submit your formal grievance in writing – the employer might wish to consider providing a form on which to do this – and forward the letter/form to your line manager or their manager if the former is the subject of the grievance.
- The manager should assess the grievance upon receipt and write to the employee concerned:
 - o Inform the employee that it is not possible to deal with the grievance as it falls outside the policy and procedure and provide the reason, e.g. it is out of time, it is not within the control of the employer.
 - o Seek clarification where the form or letter is not fully clear.
 - o Inform the employee that they will be dealing with the grievance/asking another person to investigate the grievance.
- Set a reasonable timescale within which the grievance has to be acknowledged and the course of action to be taken as a result of the grievance, e.g. **five working days** or some other reasonable timescale.
- The manager making the assessment will then either arrange a meeting/hearing or commission an investigator to undertake the investigation.
- The manager will make a decision about whether it is necessary to temporarily move staff or, rarely, if a suspension from duty is required – detailed guidance needs to be provided and a requirement placed on the manager to seek the permission of a manager who can make this decision, where they are not such a manager and to consult with appropriate human resources personnel (if present) to seek guidance and advice about the issues involved.
- Seek human resources guidance and advice where this is necessary.
- Consider and approach the parties about the use of mediation as an alternative to taking the matter through the grievance policy and procedure.
- Consider whether the matter can be investigated by an internal, or, exceptionally, an external investigator.
- Prepare terms of reference for the investigator, irrespective of whether they are internal or not.
- Set out the purpose of any investigation that will take place and the process that will be followed.

- Set out that the investigation will be fair and reasonable and will be completed as soon as practicably possible, dependent on how complex the matter is in terms of the number of employees involved, the documentation and other evidence that will need to be examined.
- Make clear that all activity in relation to the management of grievances needs to be appropriately planned rather than dealt with in an *ad hoc* manner.
- Set out what correspondence needs to go to the employee who has submitted the grievance - use and adapt the templates produced within the *Conducting a workplace investigation* document or refer to any in-house documentation that has been created.
- Commit to keeping the parties informed on a regular basis, including where tentative dates for completion or other milestones have been provided and not met.
- Where an investigation is not to be commenced, set a timescale for when the first meeting/hearing has to be arranged, e.g. within **ten working days** or some other reasonable timescale.
- Set down that a letter/email needs to be sent to the employee and what it should include – see previous bullet point regarding the investigation.
- Indicate what the purpose of the first formal stage meeting is, i.e. to allow the employee to explain their grievance and inform the person meeting with them/ conducting the hearing what outcome they desire.
- Indicate to the manager that they must have sufficient information to reasonably investigate the grievance and that it may be necessary to see others, certainly the person against whom the grievance is raised and other witnesses and that it may prove necessary to meet the person raising the grievance for a second time or reconvene an adjourned hearing after collecting more evidence. Refer managers either to the template letters provided by ACAS or separate pro-forma correspondence where this is available.
- Indicate that if a person who has submitted a grievance does not, with good reason, attend meetings/hearings or take part in investigation, there is a possibility that the grievance will not be dealt with for want of their active participation in organisational processes.
- Where the manager intends to meet with the person against whom a grievance is raised, inform them that they should provide a written invitation – email or letter - give reasonable notice, e.g. **five working days** or an alternative reasonable timescale, state that a grievance has been submitted against them, provide them with a summary of the allegation(s) and that they have the right to be accompanied (if the right is extended in these circumstances by the employer) Again ACAS templates may be utilised or the manager should be referred to any in-house pro-forma letters.

- After any witnesses have been identified, they also need to be invited to a meeting – see above for suggested correspondence.
- After the completion of the meeting/hearing/investigation, detail that the outcome must be communicated to the employee within a reasonable timescale, e.g. **five working days** or some other reasonable timescale – refer to any template correspondence that has been produced in-house to assist the manager, setting out the outcome, any recommendations and the right to appeal and the details of to whom to appeal should be addressed, informing them that they must submit their reason(s) for appeal in writing and the timescales to be adhered to, e.g. they have to submit their appeal within **ten working days** of the date of the letter/email or some other reasonable timescales.
- Set out that it is the manager's responsibility to initiate or delegate any follow-up action that needs to be taken, e.g. providing support, reinforcing standards of behaviour or conduct, providing learning and development support or arranging such learning and development intervention.
- State that the appeal will be heard by a manager not involved previously and, preferably, more senior than the manager conducting the first formal meeting/hearing
- Set a reasonable timescale to both acknowledge receipt of an appeal and one for when the appeal meeting/hearing must take place, for example, respectively, **five and ten working days** or some other reasonable timescale.
- Set out that it is the responsibility of the manager conducting the appeal meeting/hearing to ensure that the grounds of the appeal are the basis of the meeting/hearing and not a rehearing of the whole matter, unless the appeal alleges that the stage before was so badly managed that the process itself can be called into question.
- Ensure that the manager is aware that they have to notify the employee who has submitted an appeal within a reasonable timescale, e.g. **five working days** or some other reasonable timescale, setting out the decision, the rationale for it and that it represents the final decision of the employer and refer them to any pro-forma correspondence that exists.

3.5.13 Record-keeping and retention

The documentation in relation to the grievance, including any hearings/meetings or appeals, should be securely filed, access restricted to those who need to have access and no one else, should be retained for no longer than it is needed, or in accordance with any employer retention policy and procedure and that when it is time to destroy the documentation, this should be achieved through secure destruction.

3.5.14 Disciplinary action resulting from a grievance

- a) Where disciplinary action results from a grievance, this should be progressed and dealt with in accordance with any relevant employer policy and procedure or in accordance with the *Code of Practice* for those organisations that do not have the benefit of separate policy and procedure.
- b) Having set out a suggested format and content of an employer-specific policy and procedure, the same issue arises in relation to how to practically assist managers and others taking forward their responsibilities to implement either the ACAS model or the employer-specific policy and procedure.
- c) Again, this could be achieved in two ways – either refer managers to various guidance and advice available from ACAS, specifically *Discipline and grievances at work – An ACAS Guide* and *Conducting a workplace investigation*, including any templates and pro-forma documentation, which clearly provides invaluable guidance and advice in the many tasks that need to be undertaken, but is diverse in nature and not all in one place or write specific advice, perhaps in the form of Management Guidance Notes, which are allied to but separate from the policy and procedure documentation.
- d) Again, for the small and medium-sized employer, the former solution is probably the most straightforward and the most economical, as well as the most practical in terms of the frequency at which grievances occur not being likely to justify the financial and resource allocation to produce such separate guidance. Again, in using the material, though, employers need to understand, as stated above, that there is a difference in the status of the *Code of Practice* and the other documentation available specifically in relation to what any Employment Tribunal can and would take into consideration when hearing a case.
- e) There is no good reason why a larger or more complex organisation should not also do this, but it is, particularly, although not exclusively, those in the public sector, who usually implement separate provision.
- f) In this respect, these employers might wish to consider producing Management Guidance Notes on, for example
 - the role of the hearing officer, the investigator, the appeal officer
 - the right to be accompanied
 - how “reasonable adjustments” can be considered in the context of the grievance policy and procedure
 - the format for notes
 - issues of confidentiality.

3.6 **Pro-forma letters/emails**

3.6.1 Additionally, employers may wish to provide a panoply of pro-forma letters/emails, with the general content and policy and procedure requirements embedded within them e.g. timescales, right to be accompanied, appeal rights etc., as well as template plans and report formats.

3.6.2 If employers choose to follow this course of action, they should consider ensuring that they differentiate the separate parts of the process:

- the policy, which overarches the process
- the procedure, which implements the policy and which must be complied with
- the Management Guidance Notes, which have been provided as a means of assisting managers to appropriately implement the procedure, but which are not part of the procedure itself.

4 UNDERTAKING AN INVESTIGATION – KEY ELEMENTS

- 4.1 As stated in the previous Section, very usefully ACAS has produced specific guidance and advice, interspersed with some practical examples, as well as pro-forma documentation in relation to “...the essential decisions and actions that employers of all sizes must and should make when deciding to conduct an investigation”^{xv} and in discussing this aspect, the essential elements of the process will be set out and analysed in detail. Although this documentation again emphasises that an informal resolution should be explored, for the purposes of this Section, an assumption will be made that these have been explored and an informal resolution not found possible and that the formal stage of the process has been engaged. Additionally, whilst the documentation deals with both disciplinary and grievance investigations, the exploration of the topic will concentrate on the latter rather than the former.
- 4.2 It has to be noted, as with *Discipline and grievance at work – the ACAS Guide, Conducting workplace investigations* does not have the same status as the *Code of Practice* and therefore there is no compulsion in following its provisions (except, as it states at the beginning, where they use “must” as an indicator that it is a legal requirement), nor will failure to follow its guidance and advice present the same challenges as a failure to comply with the *Code of Practice*, as detailed previously. Once again, though, it would seem short-sighted not to adopt its provisions as it could reasonably be termed best practice advice and guidance.
- 4.3 Before embarking upon a discussion and analysis, let’s start with a definition and purpose for workplace investigations as provided in *Conducting workplace investigations*:

“An investigation is a fact-finding exercise to collect all the relevant information on a matter. A properly conducted investigation can enable an employer to fully consider the matter and then make an informed decision on it.” p4

- 4.4 Although the nature and extent of the investigation to be undertaken will be determined by the complexity of the grievance submitted, it is crucial to note, as ACAS does, that coming to important decisions about such matters without a “reasonable investigation” could render any decisions and actions taken unfair and mean that the employer faces potential legal action.
- 4.5 Having defined what an investigator is, the documentation goes on to detail the role of the Investigating Officer:

“The role of an investigator is to be fair and objective so that they can establish the essential facts of the matter and reach a conclusion on what did or did not happen. An investigator should do this by looking for evidence that supports the allegation and evidence that contradicts it.” Ibid

- 4.6 The rest of the documentation then breaks down in detail guidance and advice and in summary graphical form, the six stages of an investigation, with the latter being reproduced below^{xvi}:

STEP 1: Organisational preparation

- Decide if an investigation is necessary.
- Establish terms of reference – the rules that the investigation will follow, including precisely what needs to be investigated.
- Choose an appropriate investigator.



STEP 2: An investigator's preparation

- Draft an investigation plan.
- Identify who might need to be called to an investigation meeting.
- Identify what evidence might need to be gathered – and how to get it.
- Contact parties involved in the matter.



STEP 3: Handling an investigation meeting

- Establish who can accompany employees at the meeting.
- Plan what questions need to be asked.
- Interview the parties involved and any relevant witnesses.
- Handle reluctant witnesses or refusals to meet appropriately.



STEP 4: Gathering evidence

- Arrange and agree witness statements.
- Collect any relevant written records and documents e.g. timesheets.
- Collect any relevant and appropriate physical evidence e.g. CCTV.



STEP 5: Writing an investigation report

- Plan the structure of the report – remember there is a free Acas template available to use or adapt.
- Report what is likely to have happened – the balance of probabilities.
- Make a recommendation where requested.



STEP 6: After an investigation is completed

- Submit the report and conclude the investigator role.
- Retain the report for an appropriate period of time.
- Ensure any recommendations unrelated to the matter are considered.

4.6.1 Step One

- a) Although a reasonable investigation is a requirement of proper decision-making, it is feasible for a fairly straight-forward matter to be dealt with at the initial formal meeting/hearing and that the “investigation” will entail little more than seeking the perspective of the other person(s) against whom the grievance is aimed and any witnesses to those events or incidents. The facility to adjourn the meeting or hearing is specifically in place in the *Code of Practice* for this to be done. In reality, though, matters are unlikely to be this straightforward in the majority of cases and it will therefore be necessary to undertake an investigation.
- b) If an investigation is to take place then it should take place on a timely basis, as already stated, to ensure that the employee concerned is assured that the matter is being taken seriously and so, more practically, memories do not fade.
- c) ACAS recommends that terms of reference are drawn up before an investigation takes place because they:
- “...
• help complete the investigation in a timely manner
• clarify exactly what the investigator’s remit is
• clarify how they should present their findings
• ensure all key facts are responsibly investigated
• ensure an investigator only collects information and facts relevant to the matter
• minimise any negative impact on staff morale caused by investigation meetings
• minimise disruption to the organisation’s daily business needs.”^{xvii}
- d) The purpose of the terms of reference are identified as detailing what should be examined as part of the investigation, whether a recommendation is required (some employer grievance policies and procedures specifically require the investigator to provide this either singly or in conjunction with the commissioning manager), the format in which findings should be presented (inevitably, this is in the body of a report, hence the provision of a template) and to whom the findings need to be reported and any assistance available to the investigating officer, the former, usually the person commissioning the report and the latter, human resources personnel.
- e) The question of timescales is discussed, with an emphasis being put on ensuring compliance with any requirements in the policy and procedures of the employer, although a degree of emphasis is placed on ensuring that the process is “fair and reasonable”, recognising that timescales and timeliness of completion are dependent on complexity and that whilst a tentative timescale should be arrived at as it can be useful, this should not be set in concrete if this means that the overarching aim of a “fair and reasonable” investigation is detracted from, recognising that modifications in timescales are sometimes needed. In discussing the topic, what is

- highlighted, is that where modifications are needed the parties should be informed and that the modifications and the need for them are highlighted in any report.
- f) On some occasions given the fluid nature of matters under investigation, issues will arise that fall outside of the terms of reference set and the documentation therefore highlights the need to go back to the commissioner of the investigation in order to seek and obtain guidance about expanding the current investigation or indeed arranging for those matters to be investigated separately.
- g) Echoing the *Code of Practice*, the documentation recognises that the person dealing with the grievance at the initial formal meeting/hearing, is very often likely to be the same person who undertakes the investigation, fundamentally different to how an issue of conduct or discipline would be handled, where there would be a separation of functions between those who investigate and those who makes decisions if action under the relevant policy and procedures is considered necessary.
- h) The question of who should undertake the investigation is then discussed, with line managers being slated, accompanied by human resources specialists, to undertake investigations, with more senior and experienced managers being identified as taking on more complex matters, albeit ensuring that the need for people who have not been previously involved to be involved at a later stage is identified as a potential presenting issue and, exceptionally, external or independent investigators being commissioned. Although the ability of any investigator to act “fairly and objectively” is identified as of paramount concern: the following are identified as issues that must also be considered prior to appointment^{xviii}:

- are they personally involved in the matter being investigated?
- would the appointment raise any conflict of interest concerns?
- are they likely to be influenced by people involved in the matter?
- might they be involved in any subsequent decision making on the matter?
- do they have a good knowledge of the organisation and how it operates?
- what is their availability during the investigation’s provisional time-frame?
- are they trained and/or experienced in how to conduct investigations?
- how confident are they at communicating in writing and/or orally?
- what training or support may they require?

- i) The question of confidentiality is highlighted, with a threefold rationale for this – (a) to reduce negative impact on the parties (b) help ensure staff morale is not affected (c) to reduce the risk of witnesses discussing the matter or agreeing their evidence. The documentation goes on to expand upon (c) so that parties and witnesses are reminded at the earliest stage that the matters are confidential and should not be discussed with others, bearing in mind of course that the person raising the grievance will need to inform any person accompanying them of the issues.

- j) The documentation then discusses a temporary move or suspension as an action that might be considered as part of the investigation process. Whilst the question of temporary transfer or suspension are more likely to occur where specific disciplinary allegations are being investigated, these could arise on occasions in relation to grievances. Employers will need to be very circumspect when considering moving any employee, particularly the complainant, as the act itself could be considered to be a detriment and may form the basis of a claim at the Employment Tribunal, including a potential claim for victimisation. Conversely, in reality, moving a worker with specialist skills or a manager and specifically a senior manager might simply not be feasible from a business perspective.
- k) The question of criminal proceedings taking place at the same time as internal investigations is raised in the documentation. Once again, this is a situation that is more likely to occur in relation to disciplinary rather than grievance matters. If this does occur in relation to the latter, then employers are reminded that they should avoid prejudicing the criminal investigation and that taking into account that the employee concerned may be reluctant to engage if they might harm their criminal defence (on the advice of their advocate or not). In all the circumstances the employer may just have to “...investigate the matter as thoroughly as is reasonable and, if required, make a recommendation based on the facts available to them at that time.”^{xix}

4.6.2 Step 2

- a) The documentation indicates that an investigation should be undertaken as a result of a plan rather than approached on an *ad hoc* and fundamentally unorganised basis. Not only is a pro-forma plan provided as part of the support materials to the documentation, a completed example is provided in the main body of the documentation.
- b) The rationale for putting in place a plan are to provide threefold focus on (a) the facts needed to be established (b) the evidence that needs to be collected and (c) completing the investigation to the provisional timescale.
- c) As with the timescale, emphasis is placed on the potential for the plan to be modified in the light of developments.
- d) As part of the preparation stage, the documentation highlights the materials that might need to be accessed, including any relevant policies and procedures, including the one under which the investigation is taking place (re-reading it even if the investigator is already familiar with it) – it seems relevant to add here, that if the grievance deals with working approaches and practices, the investigator may also wish to look to any local protocols or written operating procedures that exist. It goes on to provide a non-exhaustive list of other sources, recognising both that

no two investigations are the same and that materials needed may change as the investigation progresses:

“ ...

- the terms of reference and what they need to establish
- what sources of evidence may be available to establish the facts of the matter
- how the evidence could be collected
- whether there are any time constraints for collecting the evidence, such as a witness going away on annual leave or CCTV records that are usually deleted after X days”^{xx}.

- e) Very importantly, employers are reminded of the nature of the investigation that they need to undertake:

“...an investigator should remember that they only have to conduct a reasonable investigation. They do not have to investigate every detail of the matter, only what is reasonably likely to be important and relevant.”^{xxi}

- f) The next requirement set down is identifying potential witnesses, and interviewing them (or asking them for witness statements, although no advice is provided about which method should be adopted). It might be reasonable to suggest that all potential witnesses are asked to provide statements and that interviews are then arranged where there are ambiguities or where statements are not clear or require further investigation. The advice provided where a large number of people are said to have witnessed an incident and where the investigator is able to establish that the accounts are consistent, is that the investigator may choose not to unnecessarily interview other witnesses. This appears to be somewhat counter-intuitive given that if statements are not required of all, only by interviewing the individuals would it be possible to determine if all are consistent rather than one or two and, from an entirely different perspective, whether there is a concern that the accounts are so consistent when it is probable that that different witnesses will have experienced an event or incident and are likely to come away with very different perspectives of what occurred.

- g) The order of evidence gathering and interviews is then discussed. Specifically referring to a grievance investigation, it is recommended that the person taking out the grievance is interviewed first so that the investigator has a full understanding of the grievance prior to interviewing others. Additionally and specifically in relation to more complex matters, investigators are reminded of the potential need to collect other evidence before interviewing a party to the grievance. Although not covered in the documentation, it is as well to mention that although multiple interviews, involving toing and froing about allegations and counter-allegations, should be avoided, a subsequent interview with the person taking out the grievance may

- be necessary in order to demonstrate fairness and reasonableness, allowing them to fully articulate and put their case.
- h) Practical arrangements about where interviews should take place are covered, indicating that interviews should normally be arranged at the normal place of work, during work time, although mention is also made of using other facilities where confidentiality may be an issue. To supplement this guidance, employers may in the latter circumstances need to consider travelling expenses, if additional expenses arise and appropriate remuneration or time-off in lieu if these are relevant considerations.
 - i) Employers are advised to ensure that the person(s) who is/are under investigation are both informed of the allegations in writing and that they are the subject of investigation. At this point it is as well to discuss an issue of concern – very often the person who is subject of allegations feels unsupported generally and vis a vis the person making the allegations. It is as well to highlight that the documentation partially covers this by stating that the names of the person who should be contacted with queries and questions should be identified, e.g. the investigator, manager or human resources specialist, however, realistically the investigator will be limited in the extent to which they can assist by the very nature of their role, the manager may be operating in challenging circumstances as they may be the manager of both parties and will need to maintain impartiality and the human resources specialist will probably only be able to assist with guidance and advice about the policy and procedure and its application. Certainly some organisations will have access to employee assistance programmes, which provide general support and counselling services, but by their very nature, they are generic in the support they offer and are more likely to provide general reassurance rather than specific guidance and advice, particularly as such provision usually explicitly precludes employee relations advice. In reality, once again emphasising the adversarial nature of grievance processes, the support sourced and obtained often comes from trade union and other workplace representatives.
 - j) Although the documentation details information about where it might be feasible not to inform an employee that they are under investigation, because they might interfere with witnesses, this is very unlikely to be a relevant consideration in the vast majority of cases and does not take account of the fact that in order to be considered to have undertaken a fair and reasonable investigation, at some point in time the person will have to be interviewed and will need to be informed about what and why they are being interviewed!
 - k) Practical arrangements for the interviews are then covered, including what should be detailed in the correspondence to the parties and any witnesses^{xxii}:

" ...

- the date, time and place of the meeting
- the name of the investigator and what their role is
- the reason for the meeting
- an explanation that the meeting is only to establish the facts of the matter and is not a disciplinary meeting
- a request to keep the reason for the meeting, and any discussions that take place, confidential
- whether there is a right to be accompanied to the meeting
- that it may be a disciplinary issue if they unreasonably refuse or fail to attend the investigation meeting" [N.B. this aspect is discussed in more detail in Section 7 below].

- l) Keeping the line managers of those involved in the investigation informed is also highlighted, so that the impact on the business, primarily so the absence from the workplace resulting from participation, can be better managed.

4.6.3 Step 3

- a) A definition is provided of an investigation meeting "...[it] is simply an opportunity for an investigator to interview someone who is involved in, or has information on, the matter under investigation."^{xxiii}
- b) A careful reminder is also included to differentiate between a grievance and disciplinary meeting, where the former must never become the latter and where if the latter is necessary, it has to be separate and follow on from proper process. Clearly this is as much about the approach that the investigator takes to their task as it is about the actual differentiation – the person conducting the grievance meeting is not "prosecuting" a case, but rather trying to collect evidence on an individual basis in order, when all evidence has been collected, to come to a decision about the outcome of the grievance submitted.
- c) A very useful section is then included in relation to recording, in its wider sense of that word, of the investigation.
- d) The investigator, could, it is suggested, either take notes themselves or arrange for someone else to do this. In this latter respect, it is important to note that the investigator has a responsibility to ensure that any person they delegate this role to is reminded in the strongest terms that they have a responsibility to maintain the confidentiality of the proceedings and that they are not to discuss the matter with anyone outside the process.

- e) Although not all employers will have the facilities to have an additional person present to take notes, there are clear advantages of having such a person present, for the investigator, which are set out here:
- the investigator is permitted to focus on their primary purpose – what is being said to them
 - [they can] concentrate on what additional enquiries are needed to establish the facts of the matter
 - the note-taker can be used to report back what was said to check the validity of the recording.
- f) Arguably it is important at this stage to discuss one of the most important skills of the investigator – the ability to listen as well as question – something ACAS recognises in providing “Tips and Techniques” as part of the documentation – see below for details. Although important in a number of contexts, perhaps investigators need to be reminded of wisdom from ancient Greece - “You have two ears and one mouth so that you can listen twice as much as you speak”^{xxiv} – after all, collecting evidence is one of the prime rationales for undertaking the investigation in the first place and if listening skills are not honed and fully utilised, vital information could be missed or overlooked.
- g) Whilst the documentation makes it clear that there is no expectation that the notes will be a word-for-word account of everything said, it indicates that there are some prerequisites:

“What notes should be taken?”

Notes taken at the meeting will usually become an interviewee’s witness statement. The notes should therefore record:

- the date and place of the interview
- names of all people present
- an accurate record of the interview
- any refusal to answer a question
- the start and finish times, and details of any adjournments
- should be written without gaps, to avoid the accusation that gaps have been filled in after the meeting.”^{xxv}

- h) Some organisations, particularly larger ones with greater resources, choose to audio record investigations, whether because of policy decisions to do so, an approach that is within the discretion to make or because they have the consent of the interviewee. Assuming that the audio recording is of sufficient quality, this certainly will provide an accurate record of the interviews undertaken and there should

be no dispute about what was said. Additionally, if the organisations concerned have decided to take this approach they will presumably have no concerns about the costs (time and resources) involved in ensuring that the audio recordings are appropriately transcribed. However, the documentation produced by ACAS has some clear warnings about audio recording, irrespective of the accuracy of the method – recording could be “intimidating”, ironically making the interviewee less likely to “talk openly.”^{xxv}

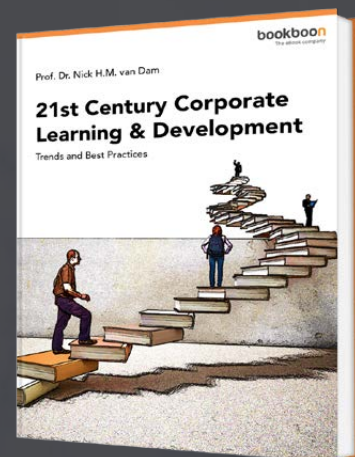
- i) What is the approach, though, when it is the employee who wants to record proceedings, as some do? As the documentation makes clear, this is a matter for the employer and to ensure there is consistency on the matter, it is something that the documentation advises the employer to make clear in its policy and procedure. The documentation goes on to remind employers (and employees) that covert recording, that is a recording without the informed consent of the parties, may well be a matter that falls to be dealt as a misconduct issue, as well as breaching the duty of mutual trust and confidence that should subsist between employer and employee. It needs to be emphasised here, that in addition to what is written, the admissibility of covert recordings may become an issue at any Employment Tribunal that subsequently takes place. In this respect, such recordings should be prohibited by employer policy and procedure, but they may still be admitted in evidence if the Employment Tribunal can be convinced by the relevant party (i.e. the employee) that it is necessary to do so. Perhaps the most appropriate response to such a potential situation, is to ensure that the process subject to recording is undertaken fairly and reasonably, thus negating the need to covertly record!
- j) As well as planning the process overall, investigators are reminded of the need to pre-plan their interviews to the extent that this can be achieved, by writing questions beforehand, primarily here because the process can “often [be] difficult and emotional” for the person raising and the person responding to a grievance in order to “... reduce unnecessary stress and help keep the interview on the right track”, it is as well to state here that the idea of approaching any of the tasks involved, including this important task by “winging it” is simply out of the question.
- k) The table summarising the interview process is reproduced below^{xxvi}:

Before the meeting takes place an investigator should	• establish how the interviewee may be able to help with the investigation and plan initial questions accordingly • book an appropriate time and place for the meeting • write to the employee inviting them to the meeting and detail any rights of accompaniment [the pro-forma letter provided by ACAS could be used]
At the start of the meeting an investigator should explain	• who is present and why • the role of the investigator • the purpose of the meeting • the need for confidentiality during the investigation • that the interviewee's witness statement may be used in an investigation report • who will see the interviewee's witness statement
During the meeting an investigator should	• ask questions to gather the facts of the matter • probe the interviewee without it being in an adversarial manner • record responses and any refusal to respond • seek evidence that may substantiate the information provided

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At the end of the meeting an investigator should	• check if there is anything else the interviewee thinks is important before ending the interview • ask if there are other witnesses that they think should be interviewed and why [stressing, that these are witnesses who can provide information about the events or incidents rather than ones, for instance, who can provide information about character generally or good character specifically] • explain that they may need to be interviewed again • explain that the interviewee will be provided shortly with a copy of their witness statement for them to check and signing to confirm that it is accurate
After the meeting an investigator should	• provide the interviewee with a copy of their statement and seek agreement that it is accurate • consider what the important facts from the meeting were and whether evidence already collected supports or contradicts these • consider whether the meeting suggested any further evidence needs to be collected or interviews arranged

- l) Moving on from the procedural and practical, the ACAS documentation provides some detailed “tips and techniques”^{xxvii}, which it indicates is “no substitute for” training and experience. This information is summarised, in table form, below:

Listening
• have a list of pre-planned questions to follow and tick off • remain focused on the witness and the reasons for the meeting • concentrate on exactly what the witness says • be open minded to anything the witness may say • acknowledge the witness’ viewpoint • listen for points that the interviewee avoids covering or giving details on • allow the witness to finish their point before moving the interview on or asking a further question • use silence to encourage the interviewee to elaborate on points

Body Language
• facing the interviewee in a relaxed body posture • being calm • not folding arms, which can be intimidatory [and, indeed, signal a “closed” approach to the person, the very opposite of someone who will listen to the interviewee] • giving an appropriate amount of eye contact [not so much that the encounter turns into a staring contest, but sufficient to show both a willingness to engage and that you are interested in what is being said] • giving appropriate affirmative facial expressions and gestures, such as nodding [and making short verbal indications that you are engaged]. N.B. “An investigator should be careful to avoid making judgements based on an interviewee’s body language. Where there is some discomfort or unease, an investigator could ask, in a sensitive way, why the interviewee is acting in a particular way, remembering that an interview of this sort can be stressful.”
Questioning techniques [N.B. useful examples of each type of question are provided in the full text]
• Challenge and test by questioning, but do so in a professional, not an intimidating manner • Use a range of questioning techniques/approaches – open [probably the majority or a substantial number], closed/specific, probing, feelings [particularly important in relation to grievances], “what else?”, summaries [to ensure that you the investigator has the right understanding]. • Avoid questions of this nature – interrogative questions, albeit sometimes necessary, they can lead to defensiveness, leading questions, as they could lead the interviewee to provide the answer that the investigator hopes or expects to hear and multiple questions, which are likely to confuse.

- m) The issue of reluctant witnesses is then covered, with investigators being urged to enquire why there is reluctance, provide reassurance and address concerns.
- n) The question of anonymised witness statements (and interview notes?) is canvassed, with a general indication that this should only be undertaken where there is a genuine fear about the witness’ identity becoming known, that it clearly disadvantages the other party and that it should only be done on a wholly exceptional basis. Investigators are also reminded that the question of anonymity should not affect the way that the interview is conducted – this should be undertaken in the normal way and a decision taken separately about what is disclosed and, importantly, what anonymised, in the documentation. As is pointed out though, even if the employer takes this decision, if legal action follows, the employer may have to disclose the identity of the person in any event.

- o) The documentation goes on to discuss the person who declines to attend a meeting and sets out the process to be followed in addressing the issue:

Establish the reason	
Legitimate Reason (e.g. ill-health)	Not Legitimate Reason
Rearrange the meeting or ask for a witness statement instead [this would appear to be an option of lesser value, as the investigator will not be able to explore all of the issues and may therefore have to go back to the person].	Remind the employee that a refusal could be contrary to the employers' policies and procedures and that disciplinary action might follow [N.B. the investigator also needs to remind the person concerned that they are endeavouring to investigate matters and that they are trying to get their perspective on matters and in the absence of interviewing them, they will have no alternative but to reach conclusions without the benefit of their input], which the investigator does not wish to do, but will do so if left with no alternative.

- p) What isn't covered in the documentation, albeit a very rare event, is when a grievance is submitted and the person who submits it shows a reluctance in taking the matter forward, by, for instance, not making themselves available for a meeting or interview. What should happen in these rare instances? It appears reasonable to take the same approach as above, albeit that if there is no legitimate reason established for the non-engagement and attendance, a decision will have to finally be taken about whether the grievance should be taken forward, given that the employee concerned is not giving sufficient reason for the employer to believe that they genuinely wish to pursue the matter.
- q) Finally, the investigator is reminded by the documentation that they should make "tactful" enquiries about the motivation of witnesses (always remembering that they are not under investigation) by asking them and, as appropriate, others, so that the a determination can be made about whether the relationship between the individual and others "may add or detract from the validity of the witness's..." evidence.

4.6.4 Step 4

- a) Investigators are reminded that they should not just collect evidence that supports an allegation or allegations, but rather that it is their responsibility to collect evidence that detracts from it or them. After it has been collected, "objective analysis" is required:

- “ ...
- what does the evidence reveal?
 - are there any doubts over the credibility and reliability of the evidence?
 - is the evidence supported or contradicted by evidence already collected?
 - does it suggest any further evidence should be collected?”^{xxviii}
- b) The issue of witness statements [or interviewee notes, if this is the form that the employer uses] is then discussed. They should be produced as soon as practicably possible after the meeting/interview, may be typed, if necessary, but can be handed over in original script, if they are clear. The individual should be given the chance to amend the witness statement (and should be asked to sign those amendments). The documentation covers the issue of where the amendments are not accepted by the investigator – particularly where the investigator believes the amendments contradict what was originally said. In these circumstances, it is recommended that a note is made and that both versions are included as part of any final report.
- c) Equally, the documentation deals with those who decline to sign the documentation. Here, enquiries should be made as to why this is the case, persuasion used to try to obtain a signature, but in the absence of success, the documentation should still be used as part of the report and a note made that the interviewee declined to confirm the notes/statement as a correct record.
- d) Where statements are used in place of notes resulting from an interview, it is suggested that this should only really be the case:
- “ ...
- if a witness is not a worker
 - when the facts required from a witness are very simple
 - where a witness is ill and unable to attend an investigation meeting.”^{xxix}
- e) Additionally, investigators are reminded that they should provide a deadline for the provision of the statement, asking specific questions and/or ask the person concerned to include the following:
- “ ...
- their name and, where applicable, job title
 - the date, place and time of any relevant issues
 - what they saw, heard or know
 - the reason why they were able to see, hear or know about the issues
 - the date and time of statement
 - their signature.”^{xxx}
- f) It is important to note here, that the documentation warns that the provision of a written statement only is of “limited use” given that there may be disputes about the account of the witness and they are not available to be probed about the statement in the same way as a live witness can be.

- g) Examples of evidence that can be collected by an investigator are then included:
- documentation – attendance sheets etc. – used both to corroborate or contradict accounts, or as the impetus for further questioning
 - physical evidence – CCTV or phone or computer records – relevant to the investigation only, lawfully obtained and not breaching the privacy of the person concerned and only used if permitted by employer policies and procedures and not used only if it is not reasonably practicable to establish matters without them. Additionally, the investigator should note what the evidence is, how it was obtained and what it reveals, as it may make it easier to refer to it at the end of the investigation. It should also be retained as it may need to be viewed again. If the issue of the expense arises regarding collecting evidence, then a decision needs to be made about whether the costs are reasonable and justify or do not justify the collection of such evidence.
- h) What steps should be taken in circumstances where a search of is required of personal possessions:
- only undertake it if there is a legitimate justification
 - even if it is possible under the contract of employment to search possessions, seek and obtain consent as it may not otherwise be lawful
 - if a search is undertaken, try to secure the employee's attendance, or, in their absence, have the manager present in their stead
 - if consent is not given, explore why and try and resolve presenting issues rather than assume that the refusal is due to guilt or non-legitimate reasons
 - if the matter is potentially criminal [which is unlikely in a grievance case] consider the involvement of the police who have wider powers in such matter
 - record all actions related to the search.
- i) Arguably the most important documentation within the investigation process is the investigation report, which should cover

“...all the facts that were and were not established, and whether there were any mitigating circumstances that also require consideration. To exclude any information may leave an investigation open to accusations of bias and filtering evidence to suit their findings.”^{xxxi}

- j) It is also made clear that the conclusions have to be the investigator's conclusions and no one else's, even where they have sought guidance and advice, such as from a human resources specialist.

4.6.5 Step 5

- a) Not only is a full pro-forma report provided as part of the resources produced as a result of the publication of *Conducting workplace investigations*, the structure and content for such a report is also provided^{xxxii}, which is reproduced in summary form below:

Introduction	• name and job title of the person who authorised the investigation • name and job title of the person who conducted the investigation • a brief overview of the circumstances that led to the investigation • the terms of reference of the investigation and if they were amended
Process of the investigation	• how the investigation was conducted • what evidence was collected • whether any pieces of evidence could not be collected and why • names and job titles of all witnesses and why each witness was relevant to the matter • whether any witnesses could not be interviewed and why • where a witness statement has been anonymised explain why and provide any details of enquiry into their character and background
The investigation findings	• summarise the findings from all relevant documents • summarise the key evidence from each witness statement • what facts have been established • what facts have not been established • whether there are any mitigating factors to consider • whether there is any other relevant information to consider
Conclusion of report (if required)	• recommendation based on all evidence collected • any other recommendations related to the matter
Supporting documents	• copies of all documents and witness statements collected and referred to in the report should be included and clearly referenced

- b) The documentation also provides “tips and techniques” to supplement the above information on report-writing and provided in the context that the person who raised the grievance may be one of those reading it:

“The report should therefore:

- be written in an objective style
- avoid nicknames and jargon
- use same form of address for all people referenced
- use appropriate language and keep simple wherever possible
- stick to the facts of the matter
- keep it concise
- explain any acronyms used
- include all evidence that was collected.”^{xxxiii}

c) Finally it is suggested that evidence should be presented to differentiate the nature of the evidence, where absolute certainty is not possible:

“ ...

- Uncontested facts: Where the facts are not in dispute, they can simply be reported as factual
- Contested facts: Where the facts are contested or contradictory they should determine what, on the balance of probabilities, took place (see below)
- Unsubstantiated claims: Where an investigator is unable to substantiate an allegation they should consider if further investigation is reasonable or report that they are unable to draw a conclusion” Ibid, p32

- d) The test for how conclusions should be reached and the issue of potential malicious claims are also covered, which are addressed in far more detail in Section 7 below.
- e) The documentation states that investigators are often asked to make recommendations as part of their report and that these are usually to take formal action, informal action or no further action, albeit that the investigator is warned neither to prejudge any grievance hearing or disciplinary hearing or recommend a sanction.
- f) Examples of the recommendations are then given, which are produced in summary in table form below:

Formal Action
• to initiate a disciplinary hearing • changes to an organisation’s policy or procedure • further investigation into other matters uncovered

Informal Action
• training or coaching for parties involved • counselling for parties involved • mediation for parties involved • notification that further similar action may result in disciplinary action
No Further Action
• Although an investigator may find there is no further action necessary they could recommend that counselling, mediation or another form of support may be beneficial to the parties involved and the organisation.^{xxxiv}

4.6.6 Step 6

- a) Although the documentation states that at the end of the investigation process, the role of the investigator comes to an end, it sets out three further roles that might prove necessary:
- Discussing their findings with the person who sponsored the report.
 - As a witness at a subsequent hearing.
 - As a participant in a policy or procedure review, as appropriate, to utilise the experience built-up during the course of the investigation.
- b) It is made clear that the role needs to have an end, because if the investigator continues to be involved after the investigation, a perception of bias may arise, particularly, presumably where the person meeting with the employee or conducting a hearing with them is separate from the investigator. Additionally, it needs to be abundantly clear that the investigator investigated, but does not make final decisions – that is a role usually undertaken by the commissioning manager or a different and usually more senior manager within the organisation, generally and particularly related to any disciplinary decisions made. It is indicated, however, that if recommendations from the investigator are not followed, then reasons should be recorded in writing.
- c) Other occasions where the investigator may need to take a role, not detailed in the documentation, is where the investigator becomes the presenting officer at a meeting or hearing, where they are the person who was commissioned to undertake the investigation rather than the manager first dealing with a grievance. They will present the findings of their report and be the subject of questioning by the person who originally submitted the grievance (and/or their companion) and by the person who is “hearing” the grievance. Additionally, in relation to subsequent meetings/hearings or appeals, where the investigator “presented” the grievance case, they, in effect, respond to the appeal, again being subject to the questioning

- already detailed. This role would be undertaken by the original manager dealing with the matter if the investigation role was not commissioned.
- d) The documentation states that in certain circumstances a matter may arise at a meeting/hearing after the investigation, which necessitates an adjournment so that the matter can be raised by the person conducting the meeting and the investigator to explore and clarify the matter. The documentation makes it clear that it would only be in “wholly exceptional circumstances” that the whole matter would need to be reinvestigated and that it is more likely that the person conducting the meeting might ask that the investigator investigate the new issue or undertake that task themselves. Through this process it is then possible to put right any deficiencies that may have occurred, very important to the concepts of fairness and reasonableness, but also a key factor if the matters subsequently leads to an Employment Tribunal application.
- e) Finally, the documentation deals with what can be termed the data protection elements of the report. In summary:
- Retain the report for an appropriate period of time [if there is no employer policy, consider the practicalities – will it be needed for subsequent legal action, for instance or use the Data Protection Principles – the data should not be retained “... for longer than is necessary for that purpose or those purposes.”^{xxxv}
 - Securely store it.
 - Restrict access to it.
 - If a person wishes to see the report, restrict their access to what they have provided or is reliant on information they have provided, as they should not be given access to information about others – redact information where there is mixed information about them and others.
 - Securely dispose of the material when it is no longer required.
- f) One important omission in the documentation is the question of learning and development interventions for those who will undertake the role of investigating officer, albeit that reference is made at the end of the documentation to the availability of courses from ACAS.
- g) Why is it such an important topic? There are many reasons, chief amongst them are:
- Investigations can often be complex and the provision of learning and development interventions are likely to lead to both a more skilled approach and one that is imbued with more confidence.
 - There is a specific skills set that needs to be emphasised when taking on the role of an investigator that not all managers will have and they need to be properly prepared to use those skills.
 - The need to investigate is probably a very *ad hoc* task, undertaken only once or twice and therefore unless learning and development is provided, the skills will not be embedded.

- Potential investigators need the safety of a learning and development environment to practice practical tasks, make mistakes, learn from those mistakes, seek guidance and advice from more experienced managers or from, for example, human resources specialists, before undertaking the task for real.
- h) As with the more general training, both because of turnover of managers, to accommodate new managers and ensure managers who trained some time ago, have the opportunity to retake the learning and development activity, larger and medium sized organisations should consider having such activity programmed in on a rolling basis.
- i) What learning and development intervention methods should be considered? Face-to-face learning and development interventions should be considered, ensuring that the practical is emphasised over the policy and procedural aspects, given that the latter is already present in documentation. Given that many managers indicate that they are too busy to undertake learning and development away from the workplace (even where it is training provided in-house), e-learning might be considered, as long as it is both practical and to the extent it can be, interactive. These are, again, only solutions that are feasible for the large- and medium-sized organisations, with the requisite resources to countenance and take forward such solutions.
- j) As in the next section, in smaller organisations, including in those where there is one owner and one or two employees, perhaps such learning and development will not be considered justifiable from a cost perspective or indeed from necessity, because of the infrequent nature of this work and in those circumstances the owner would be advised to rely upon specialist guidance and advice from human resources or legal specialists prior to undertaking the task.

5 GRIEVANCE MEETINGS AND HEARINGS

- 5.1 Although the subject of meetings/hearings are dealt with in the *Code of Practice, Discipline and grievances at work – An ACAS Guide* and in *Conducting workplace investigations*, the information is not as comprehensive as that in relation to investigators, except, arguably in relation to the manager who undertakes their own investigation, as is feasible within the provisions of the *Code of Practice*. There is a need to supplement what is available so that those who conduct such meetings/hearings are better placed to undertake the role.
- 5.2 What the documentation does not cover is the skills needed to undertake the role and the tasks the manager conducting the meetings/hearing(s) need to undertake and/or manage, including those that are required at the appeal stage.
- 5.3 Clearly a prerequisite of conducting such meetings both effectively and fairly and reasonably is to be familiar with the policy and procedure that underpins the hearing/meeting taking place, whether that is in-house material or the process is reliant on the ACAS model process. Some medium and larger organisations will have specialist human resources staff in place to provide guidance and advice to their managerial colleagues and they may even accompany managers in certain instances when the meetings/hearings take place, but their role is specific and it is almost always the operational manager who is the decision-maker, not the human resources specialist and therefore it is the responsibility of that person to make sure they are properly prepared.
- 5.4 Meeting with those who have submitted grievances, as well as others who are involved, is an important aspect of the employer/employee relationship and to imply that this task can be undertaken simply by reading policy and procedure documentation or the ACAS guidance would not be sensible.
- 5.5 It seems reasonable to suggest that just as learning and development interventions should be used for all managers who are likely to be involved in managing the grievance process, as well as those charged with undertaking investigations, so then should learning and development interventions be implemented specifically addressing the obligations to meet with, conduct hearings and appeals and manage the processes that pertain.

- 5.6 In smaller organisations, arguably, through necessity or, more importantly, cost considerations, such learning and development would not be feasible or realistic and in those circumstances the owner would be advised to rely upon specialist guidance and advice from human resources or legal specialists prior to undertaking the task.
- 5.7 What tasks does the manager need to undertake? The following checklist should be of assistance, both in relation to initial meetings/hearings and subsequent ones and appeals:

- Make arrangements for the venue, ensuring that it is fit for purpose in terms of maintaining confidentiality, size, accessibility etc.
- Ensure that a note-taker is present and that the note-taker is aware of their responsibilities with regard to maintaining confidentiality.
- Do not try to “wing it” in relation to such an important aspect of the employer/employee relationship – generally be prepared and follow the rest of the checklist.
- Ensure that you are familiar with the policy and procedure under which the meeting/hearing is taking place.
- Ensure that you are aware of your role and responsibilities and be accountable for ensuring that they are undertaken and met.
- Make sure you are fully conversant with the issues and documents pertaining to the grievance.
- Prepare some questions arising from your reading and be prepared to ask follow-up questions or other questions as the need arises.
- If there is a potential for “reasonable adjustments” to be made to facilitate appropriate participation by a party or a participant(s) or who have particular communication needs, make sure the issue are addressed and that appropriate steps are taken.
- If you are not going to have the benefit of a human resources specialist at the meeting or hearing, ensure that you discuss relevant issues beforehand – additionally, do not be afraid of taking short adjournments, where it is necessary to do so, to take guidance and advice if you need something clarifying or are not sure of an issue.
- Ensure that invitation letters and all necessary documentation, a copy of the relevant procedure and the investigation report and attachments, for example are sent and that they are sent in either a reasonable amount of time or in accordance with the timescales set in any relevant policy and procedure.

- At the commencement of the meeting, confirm the following:
 - The names, job titles and roles of those present.
 - The policy and procedure or documentation to be used as the basis for the meeting/hearing.
 - The structure of the meeting/hearing and, in summary how it will be conducted, e.g. the person taking out the grievance will state their case, the respondent and person managing the meeting will ask questions, witnesses for the employee will be called and questioned in the same manner, any witnesses called on behalf of the respondent will be questioned in their turn, the employee and respondent will make closing statements, summarising, without, for instance, introducing new material and the meeting/hearing will then be adjourned for a decision/outcome to be arrived at.
 - The decision will be confirmed in writing, within a reasonable time scale or in accordance with the timescale set.
- Control and manage the meeting or hearing in a fair and reasonable manner and ensure that it is conducted without unnecessary interruptions, discord or where any party feels threatened or under inappropriate pressure.
- Be prepared to offer short adjournments so that companions can be consulted or where, for instance a participant has become upset or for "comfort breaks" or any other legitimate reason.
- Ensure that the meeting/hearing is conducted in accordance and compliance with the *Code of Practice* if this is what is being used or with any policy and procedure used.
- After the meeting
 - Ensure that you are content with any correspondence that is sent, making sure that appeal rights are included and to whom they should be addressed, where this is a relevant consideration, even when this documentation is drafted for you, as you are accountable both for the decision, how it is conveyed and the content.
 - Equally, ensure that you check any notes or minutes written to make sure that they are an accurate reflection of the meeting/hearing and amend if necessary, as, once again, you are ultimately accountable for them.
 - Be prepared to review what happened during the meeting/hearing to contribute to the continuous improvement of your own or others' practice.

- o If there are service or organisational learning points that arise from the meeting/hearing or where policy, procedure or other documentation needs to be reviewed, ensure that these matters are taken up with the appropriate people within the organisation and are taken forward.
- In relation to appeals, those elements set out in the previous bullet point are relevant, with the addition of ensuring that the correspondence with the employee makes clear that the decision is the final one that the employer will make in relation to the matter.
- In the event that an employee takes the matter to an Employment Tribunal it is inevitable that those managers meeting or convening a hearing with the employee will need to provide witness statements and may well have to attend any hearing that takes place.

5,8 The wide range of “tips and techniques” set out for investigators in *Conducting workplace investigations* in relation to their investigatory role and as detailed in the previous Section, are just as relevant to the manager who meets or convenes a hearing in relation to a grievance.

6 WORKPLACE MEDIATION AND EMPLOYEE GRIEVANCES

6.1 Workplace Mediation can be described as:

“...a structured process whereby an impartial mediator facilitates communication between those in dispute in order for them to understand each other better and for them to come up with mutually acceptable solutions that will improve the working relationship in the future.”^{xxxvi}

6.2 Why, though, is Workplace Mediation now so prominent in this field of activity and, far more importantly, why should employers be persuaded to utilise the process either as an alternative to the traditional implementation of a grievance policy and procedure or as an integral part of its implementation?

6.3 By virtue of the Employment Act 2002 (Dispute Resolution) Regulations 2004^{xxxvii}, government imposed, amongst other things, a minimum grievance procedure on employers “...in relation to any grievance about action by the employer that could form the basis of a complaint by an employee to an employment tribunal”^{xxxviii}, including both for current and former employees^{xxxix}.

6.4 Approximately two years later the then Department of Trade and Industry commissioned Michael Gibbons, the business and regulatory specialist to review employment dispute resolution across the nation. He completed his review in March 2007^{xl}.

6.5 Whilst Michael Gibbons acknowledged^{xli} that the statutory procedure brought “some benefits”, he concluded that they placed an “unnecessarily high administrative burden” on both employers and employees and therefore called for their repeal, a recommendation that was accepted and the repeal was brought about by the implementation of the Employment Act, 2008.

6.6 Having dealt with that aspect of the review, Michael Gibbons went on to write:

“It is clear that the earlier a dispute is settled, the better it will normally be for all concerned e.g. in terms of disruption to businesses and lives, and associated costs. Early resolution can also involve outcomes not available through the tribunal system such as a positive job reference, an apology and changes in behaviour.”^{xlii}

6.7 He goes on to make the following point:

“Mediation and other alternative dispute resolution techniques are effective means of achieving early resolution. However, in the current system parties tend to get caught up in process rather than focusing on achieving an early acceptable outcome.”^{xliii}

6.8 In those circumstances, Michael Gibbons, citing the success of initiatives in both New Zealand and the USA, makes the following recommendation:

“Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e.g. through greater use of in-house mediation, early neutral evaluation, and provisions in contracts of employment.”

and:

“Offer a free early dispute resolution service, including where appropriate mediation, before a tribunal claim is lodged for those disputes likely to benefit from it. The Government should pilot this approach.”^{xliv}

6.9 Before proceeding to discuss those recommendations, it is important to supplement the earlier definition of Workplace Mediation, with one for conciliation. ACAS offers this definition of its service, albeit that the definition of the term is wider than just the service provided by ACAS:

“Conciliation involves an independent ACAS conciliator who discusses the issues with both parties in order to help them reach a better understanding of each other’s position and underlying interests. Without taking sides, the conciliator tries to encourage the parties in a dispute to come to an agreement between themselves.”

6.10 As will be noted, this appears to be extremely similar in nature to a definition of mediation. The fundamental difference between the two is, however, the role of the conciliator as opposed to that of the mediator. Whereas the latter facilitates the parties to the dispute in reaching their own solutions, it is reasonable to conclude that the conciliator is likely to play a more active role in suggesting solutions to the parties, albeit that, ultimately, it is for the parties to either adopt or not adopt the suggestions. Arguably, then, the conciliator is generally more directive than the mediator.

6.11 Following on from the Gibbons report, the latter recommendation was implemented as the Early Conciliation process, administered by ACAS, which, with a small number of exemptions, requires applicants to the Employment Tribunal to seek conciliation with their employer before being able to make a formal application to an Employment Tribunal. Although there is a compulsory element to contact ACAS before proceeding to the Employment Tribunal, no party to those proceedings is obliged to participate.

6.12 The former recommendation provides far more impetus to both employees and employers seeking alternative dispute resolution pathways.

6.13 In this respect, ACAS makes it clear that:

“An independent third party or mediator can sometimes help resolve disciplinary or grievance issues.”^{xlv}

and promotes the potential use of the approach at frequent intervals through this substantial Guide.

6.14 In writing the remainder of this section I intend to provide employers, irrespective of size or complexity with information so as to enable them to make informed choices about using workplace mediation either as an alternative dispute resolution mechanism *per se* and/or embedding such an approach as an integral part of any policy and procedure put in place by them to respond to and handle and manage employee grievances.

6.15 What are the advantages, and, indeed, the disadvantages of utilising workplace mediation?

Advantages	Disadvantages
• Relative Costs – the cost of workplace disputes, particularly if they go to law can be saved or partially saved by using workplace mediation. • Relative resource savings – using workplace mediation is more resource efficient than going through the whole grievance process.	• Paying for learning and development for internal mediators is costly. • Paying for independent external mediators is costly.

- | | |
|---|--|
| <ul style="list-style-type: none"> • Better outcomes for users – even if an employee “wins” a grievance the process is likely to lead to continued ill-will and frustration, whereas a properly conducted workplace mediation, with an agreement reached, is likely to be a far more positive experience and is not reliant on “winners and losers.” • Whereas workplace mediation can result in positive outcomes, an employee who goes through the grievance process may not be successful and is therefore likely to remain a disenchanted employee. • Workplace mediation can bring “closure”, where application of the grievance process may not achieve this end. • Workplace mediation has a high success rate where properly trained, qualified and experienced workplace mediators are utilised. | <ul style="list-style-type: none"> • Workplace mediation is an unknown and untested mechanism with a number of organisations and will therefore need to achieve “face” validity and be embedded before being fully understood and accepted, which is time consuming for such organisations. • Workplace mediation may not work and the grievance process may need to be utilised to its fullest extent, which could be termed as wasteful of time and resources, including financial resources. • The ability to successfully use workplace mediation is based on the timeliness of the intervention – far too often it is used as a last resort rather than a first resort, when minds are made up and it is difficult to work in that situation. • Workplace mediation is voluntary in nature and requires the active consent of both (or all) parties and therefore may not be possible, even after persuasion and information provision, if that consent is not forthcoming. |
|---|--|

6.16 In the light of this and other information available, if employers wish to utilise workplace mediation as an integral part of their approach to managing grievances or as a potential alternative dispute resolution mechanism, what are some of the issues that they need to be aware of.

6.16.1 Using Internal or External Mediators

- a) An employer has the choice of using in-house mediators or external ones, or, indeed a combination of the two
- b) There are both advantages and disadvantages which may influence the ultimate decision

Advantages	Disadvantages
• Employees may not believe that internal mediators are truly independent. • Employees may not believe that internal mediators will maintain their confidentiality. • If only provided with an internal mediation option, staff may not feel able to utilise it. • Conversely, some employees may feel enabled to use internal mediators because they are familiar with the organisation, albeit that external mediators would indicate that this is not a prerequisite, that it is workplace mediation skills and experience that are important and that information about the organisation may be gleaned as part of the meetings with the participants. • Generally, external mediators tend to have a better developed and more experienced background in a wider range of workplace mediations. • Given that internal mediators are usually workplace mediators in addition to their everyday role with an employer, there will be an impact on the business if they are utilised.	• As well as the cost of learning and development for internal mediators, there are ongoing costs for this aspect when turnover of staff is considered. • Infrastructure and management arrangements regarding allocation of internal resources need to be considered, which involves additional costs. • Because of the nature and extent of the work that internal mediators undertake, they may not gain or maintain the requisite skills and experience to undertake the more complex mediation cases. • External mediators can be experienced.

6.16.2 Using Only Properly Trained, Qualified and Experienced Mediators

- a) It is reasonable to suggest that employers and their employees are better placed to receive a professional service if they utilise mediators, whether internal or external, who are
- trained
 - hold a recognised national qualification
 - are sufficiently experienced to undertake the necessary work

- adhere to proper professional standards and ethics^{xlvi}
 - are members of an appropriate professional association
 - commit themselves to continuous professional development
 - commit themselves to being supervised
 - hold professional liability insurance.
- b) This important work should not be left to those who believe that they have the requisite skills and experience or that anyone can undertake the task irrespective of these factors or considerations, given that the task in hand is likely to not be achieved, long-lasting damage done and the situation made worse rather than resolved.

6.16.3 Ensuring that participation in workplace mediation is wholly voluntary

- a) If workplace mediation is to be used it must be used as a wholly voluntary activity.
- b) Employees should not be forced to participate – unless there is informed consent then unwilling participation will amount to lack of proper engagement.
- c) Whereas attempted informal resolution of grievances can be a prerequisite of moving to the formal stage of either the provisions of the Code of Practice or employer-specific processes, access to the grievance process or procedure cannot be conditional on having tried workplace mediation prior to this.

6.16.4 Ensuring that workplace mediation is publicised and support

- a) It is important that if workplace mediation is part of the way that employers wish to deal with and resolve workplace disputes that it is publicised, not just in relevant policy and procedure documentation, but more generally, via web presence and intranets etc.
- b) Support should be shown for this intervention, with information about why it is an alternative and potentially better way of addressing matters than through the use of the grievance procedure.

6.16.5 Ensuring that workplace mediation is used on a timely basis

- a) Whilst it is possible to use workplace mediation at any stage, it is reasonable to conclude that when it is used as an intervention of first rather than last resort it has a higher chance of being successful than when used at a later stage, particularly when mindsets are likely to be more established and embedded.

- b) Finally, the discussion needs to move to how workplace mediation is to be used in the workplace – as an integral part of the grievance procedure or as a replacement for it.
- c) Little needs to be said about embedding workplace mediation as an integral part of existing or future employer-specific policy and procedure or, indeed, about its place in the default model provided by ACAS. In the latter case, it has already been highlighted that ACAS is supportive of the use of workplace mediation as an intervention *per se* and as an alternative to informal or formal stages of the grievance process. In the case of the former, equally, there is no reason why it should not be an integral part of any such policy and procedure, once employers have considered the advantages and disadvantages of the model and once they have, perhaps, trialed it and assured themselves of the many benefits that can accrue.
- d) David Liddle, Chief Executive Officer of The TCM Group, which provides mediation, training and employee relations services, and who is both one of the leading proponents of and experts in the field of workplace mediation believes that “It is now time for a radical rethink of dispute resolution within our organisations.”^{xlvii}
- e) In writing the TCM Model Resolution Policy he aims to:
 - “ ...
 1. To provide a timely and effective alternative to failing grievance procedures.
 2. To promote the constructive resolution of workplace disputes.
 3. To develop conflict resilient workplaces and conflict competent managers, leaders and HR professionals.”^{xlviii}
- f) Acknowledging that the proposals he makes are radical and that employers may not be willing to take the steps necessary to replace their traditional approach, he sets down why those traditional approaches are not working^{xlix}:
 - “ ...
 - They are reactive and are often used at a late stage of a conflict rather than at an early stage.
 - They are inherently adversarial.
 - They perpetuate a defensive, a blaming or an avoidance response from the parties.
 - They polarise the parties and cause positions to harden.
 - The parties don’t have control over the process, or the outcome.
 - They rarely identify the root cause of a conflict.
 - Employee and business needs are overlooked or ignored.
 - Opportunities for learning and systemic or cultural change are impeded or lost.
 - They reinforce the idea that someone else is responsible for the cause of the problem, and someone else is responsible for fixing the problem.
 - They impede creativity and innovation, which are critical to business success and economic growth.

- They appear to be quasi-legal and give the impression that the process is in some way an adjunct to a legal process.
 - They are rights based rather than interests based.
 - They undermine employee engagement.
 - They seek to mitigate the risk of future legal action rather than offer a genuine attempt to resolve a dispute.
 - They are often counter-intuitive – they don't offer a common sense approach to dispute resolution.
 - They lack empathy.
 - They create a dysfunctional "grievance culture."
- g) As well as providing the policy itself, TCM provides details of the core principles underlying the policy and provides details of the advantages of its uses¹:
- "It promotes and encourages positive relationships and constructive dialogue. It's about leaders and managers walking the talk."*
- It links dispute resolution with your values and vision, and it promotes positive and constructive behaviours in the workplace.
 - It replaces your existing grievance policy with a simple Resolution Policy.
 - Employees, employers and unions can work collaboratively and achieve constructive resolutions to disputes and conflicts
 - It develops a conflict resilient workplace and conflict competent management and HR functions.
 - It integrates the values and principles of mediation into your organisation.
 - It gives control and responsibility back to your employees and managers.
 - There is a significant emphasis on mediation and early resolution.
 - It offers a new name and a new focus for dispute resolution.
 - It takes the grief out of grievances.
 - It makes empathy, dignity and respect explicit features of dispute resolution.
 - It reduces the amount of time HR professionals and managers spend on grievance case management.
 - It will help your organisation to transition from a "grievance culture" to a "resolution culture".
 - It includes a comprehensive dispute triage process which Human Resources (HR) and Employee Relations (ER) professionals can use to assess the most suitable route to resolution.
 - It is compliant with the Acas disciplinary and grievance code of practice.
 - In more serious disputes and in cases where there is a clear breach of your code of conduct, it offers the opportunity to escalate to an investigation or other formal action.

- There is an opportunity to offer mediation at each stage, even where the case has escalated to formal action. It gives greater control and offers greater flexibility to all parties.
 - It supports return to work procedures following absence or suspension.”
- h) Following on from a summary of how the model policy works, the documentation then details the approaches that can arise from its implementation:
- Resolution assessment.
 - Resolution meeting.
 - Mediation.
 - Investigation.
 - Conflict coaching.
 - Formal resolution meeting.
- i) In summary, whilst convinced of the merits of taking the approach that TCM proposes, the reality is that despite the arguments being cogent and convincing, employers are so wedded to the traditional approach they may be more convinced of the merits of workplace mediation as a direct alternative dispute resolution once they have used it as an integral part of their traditional policies and procedure or as part of their implementation of the *Code of Practice*. In effect, with the advantages to be accrued from its use as an embedded part of policy and procedure, such usage could be a catalyst that bridges the gap before the leap of faith can be made.
- j) In closing this section, I intend to provide, in summary form, information that I use to introduce potential participants in workplace mediation^{li}, recognising that other mediators may differ in their approach.
- k) Following a definition, the process is set out, which has been heavily influenced by my training for professional qualifications in workplace mediation^{lii} and experience of undertaking several workplace mediations:

Process
After the sponsor has sought and obtained the consent of the parties to the workplace mediation and commissioned me, I will arrange a suitable date and time with the parties.
It is envisaged that the workplace mediation will take place during the course of a day, although, exceptionally, it may take longer.
The first part of the day will be set aside for individual meetings with the participants.

The purpose of the meetings are to: • explain and clarify the role of the mediator and the mediation process; • consider the various elements of the dispute and the impact on the individuals involved; • identify the history of the situation as well as the participants' future needs and expectations; • discuss participants' goals for mediation; • agree terms of reference for the mediation process which the participants are able to commit to.
If the participants are then willing to progress matters – and it must be emphasised and reemphasised that participation is wholly voluntary – then the next stage is for the parties to participate in a mediation session, which will be facilitated by me.
The role of the independent workplace mediator
The independent workplace mediator is an independent person who is invited into a workplace where there are parties involved in conflict or dispute in order to facilitate with them to endeavour to find a positive resolution to their situation.
The independent workplace mediator does not: • Judge who is right or wrong. • Blame the parties involved. • Tell people what to do.
The role of the independent workplace mediator is to carefully listen to what the parties have to say and to ask questions which enable the parties to share information.
The independent workplace mediator facilitates the parties in addressing their concerns and issues, in addition to discussing what their expectations and goals are for the future.
The primary focus of the independent workplace mediator is to assist the parties to move forward, facilitating the process of looking at future needs, expectations and options.
The underpinning principles of workplace mediation
Mediation is completely voluntary and should only to be entered into if the parties wish to do so. Under no circumstances should parties feel bullied or intimidated into entering into the process.
Mediation allows for a safe and constructive environment in which parties can listen and speak, protected by ground rules that preclude threatening, intimidating or bullying behaviour.
The focus of mediation is the future – the process encourages openness and honesty, and it ensures that each person's point of view is considered. Through mediation, participants are enabled to develop realistic, agreed and measurable action plans for the future.

At the centre of the mediation is that the participants offer their own solutions to presenting issues, with the mediator acting in a facilitative role.
Mediation is a confidential process – no information will be shared with others without the permission of all participants, although a copy of the written agreement, if the mediation is successful, will usually be shared with the sponsor. In order to reinforce the importance of confidentiality, participants will be asked to sign a confidentiality agreement.
Ground Rules for the Joint Session
If the parties concerned are prepared to go forward with mediation, the joint mediation session is underpinned by some basic ground rules, which the parties are expected to agree as part of the individual meetings: • Listen to what participants are saying, without interrupting. • Treat people respectfully. • Respect the right of others to have a point of view and their right to express their point of view. • Do not shout or act in an abusive or threatening manner.
The Joint Session Process
Having agreed to the ground rules, each participant will then have the opportunity to speak about their perspective. This is done during uninterrupted speaking time. It is important to prepare for this as it is not always easy to say what you want to say when you feel tense. Notes or bullet points can be helpful. You should try to speak for a maximum of five minutes, but you may take longer if necessary. Each party is given the same opportunity to speak and listen.
The role of the independent workplace mediator is to act as a facilitator, listen carefully, ensure that ground rules are adhered to, ask open questions, summarise what is said and generally lead the session in a positive manner, whilst ensuring everyone's perspective is considered.
In terms of finalising the mediation session, whilst each situation is different and what is needed may be different, depending on the circumstances, it is important that parties have the opportunity to start talking again and that they agree what they want to happen in the future. If agreement on a way forward is the outcome, then a written agreement is drawn up, which the participants sign and are given a copy. As mentioned above, it is normal practice that this written agreement is also provided to the sponsor.
What you agree to in undertaking mediation with an Independent Workplace Mediator
Any information or documents received or developed during the mediation process will not be used for any purpose other than that for which it was intended, i.e. resolving this conflict through mediation.

All information received by me during the mediation process is done so in the knowledge that it must remain confidential and will not be disclosed to anyone else, other than with the joint consent of the parties concerned, usually, as stated above, confined to providing a copy of the mediation agreement, if reached, to the sponsor.

I confirm that I will only maintain documentation developed as part of the mediation for a reasonable time after the mediation has taken place and then such documentation will be destroyed by me. If, in the highly unusual circumstances of being required to do so, I will disclose any such documentation still in my possession on the order of either an Employment Tribunal or Court, as they are not subject to being privileged by reason of having been created as a result of the mediation.

It should be noted by participants that all discussions during the mediation process are “without prejudice” and “privileged”, which means that nothing that is said by anyone during the process may be put forward as evidence in any subsequent internal determination process, appeal, Employment Tribunal or Court action.

Questions and Queries

Any questions or queries about the process can be dealt with at the individual meetings.



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7 EMPLOYEE GRIEVANCES – SOME KEY ISSUES

7.1 ACAS Code of Practice

- a) Compliance with the ACAS Code of Practice is foremost amongst those issues centering around employee grievances.
- b) As already indicated, whilst a failure to follow the provisions of the *Code of Practice* will not give rise to action itself, the potential monetary and reputational impact on an employer of not doing so when a matter falls to be decided at the Employment Tribunal are such that compliance makes far greater business sense and is far more beneficial from a monetary and reputational sense than non-compliance.

7.2 Compliance with Company Grievance Policies and Procedures

- a) Although many lay people might believe that the Employment Tribunals hear both “sides” of a case and then comes to a decision on the merits of the evidence, the reality is very different. It is a central and well established point of practice that an Employment Tribunal is not permitted to substitute its own views for that of the employer when deciding, for instance, the fairness or otherwise of a dismissal. Rather, the Employment Tribunal has to determine whether the employer’s decision fell within a band of reasonable responses that a reasonable employer would take in the circumstances of the case. One of the matters that might influence that decision making, is whether the employer has policy and procedure in place and whether it followed that procedure – if it did not and substantially or unreasonably did not follow what it set down for its own operation it will be on the defensive, not an ideal position to be in when facing the law.

7.3 The Importance of Timeliness

- a) Timeliness is a theme that runs throughout the management of grievances.
- b) From an employee perspective, it is not unusual for a time limit to be applied to complaints, a period within which an employee has to submit a grievance for it to be considered by an employer. It is reasonable to conclude that this is included in order to ensure that matters of recent concern are raised, where memories will be fresh and evidence can be appropriately collected. Equally, there may be an argument to suggest that if matters are not raised on a timely basis, then it

might be reasonable to conclude that they have not had such an impact that they should be considered (although, see later in this paragraph for exceptions). There is no definitive period of time within which a grievance needs to be submitted, but it is not unusual for an employee to have to submit a grievance within three months of the incident(s) or event(s) complained of. The chief exception to the rule is where it is being alleged by the person raising the grievance that they are subject to discrimination or bullying and/or harassment on the basis of a “protected characteristic” (see table below).

The following represent protected characteristics:

age;

disability;

gender reassignment;

marriage and civil partnership;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

Source: s4, Equality Act 2010

- c) In circumstances where the employee concerned is alleging that one or more of these is the subject of their grievance and that in taking out their grievance, they are alleging a course of action on the part of the person(s), the latest example of which has resulted in them raising the grievance, rather than previous ones, which may well fall outside of the time limit applied normally. It is reasonable to conclude that this feature is included as it is notoriously difficult to legitimately allege these matters generally and more specifically it is often difficult for someone making this kind of allegation to point to one or even a number of isolated incidents or events as a reasonable foundation for triggering a grievance.
- d) From the employer perspective, timeliness is generally important on two grounds:
- o to take action to investigate and, as appropriate, convene meetings/hearings in relation to a grievance on a timely basis is to send an important message that employee grievances are important and will be treated as such

- o equally, to respond to a grievance on a timely basis will ensure that memories do not fade and the employer is better placed to collect evidence.
- e) As will have been noted, the *Code of Practice* makes frequent reference to “unreasonable delay”, which is undefined, but which will be the subject of scrutiny if the matter reaches the Employment Tribunal. In ensuring compliance with the *Code of Practice* employers need to set realistic and reasonable timescales in terms of responding to the grievance, ensuring meetings take place, undertaking any investigations on a timely basis, dealing with appeals in a timely fashion and ensuring that outcomes from such meetings/hearings or investigations are notified to the person concerned, in writing.
- f) If the employer goes down the path of writing their own policy and procedure in relation to grievances, then in writing them, they need to take note of setting realistic but reasonable timescales and then ensuring that they meet the targets. In wholly exceptional circumstances, where there needs to be a variance to the timescales, this must not be unilaterally imposed, but discussed with and where it is possible to do so, agreement reached with the employee about such a variance.

7.4 The right to be accompanied

- a) The ACAS *Code of Practice* states the following in relation to the right to be accompanied, during, amongst other processes, the grievance meeting(s) (or hearing(s)), where the worker concerned has a:

“...statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker.”

- b) The right to be accompanied by a “fellow worker” addresses the issue of workplaces that are not unionised, albeit that in this particular instance, the statutory right to be accompanied is not restricted either as to whether trade unions are recognised *per se* or to those trades unions that are recognised where others are not, as long as the trade union is recognised as independent, so the right to be accompanied could still be asserted even in these two set of circumstances. The only restriction in relation to any relevant companion is whether the request to have them accompany the employee or worker is “reasonable”, which will be fact-sensitive. Clearly, in making their decision, the employer must not, conversely act “unreasonably” otherwise they risk falling into potential error with regard to their compliance with the legislation covering the right to be accompanied^{liii} and the *Code of Practice*.

- c) Often employees will seek to bring another person to a meeting or hearing in relation to the grievance, whether that be a lawyer, a partner, their parent or their child, often because they are not a trade union member or do not wish to involve a fellow worker or their fellow workers do not wish to be involved or because they believe that a lawyer will provide them with a professional service or their alternative is a known and trusted person or, indeed, for a variety of other reasons. Should the employer agree? In general terms it is reasonable to conclude that they should not. In the vast majority of cases the suggested persons named in the *Code of Practice* are sufficient. Additionally, involving lawyers in workplace matters seldom helps matters, given that the vast majority are used to the adversarial nature of the court environment, have little understanding of the specific workplace and its practices and are likely to misapply their natural tendency to treat the workplace as a court room. Equally, relatives are naturally invested in the well-being of their relative and in general terms are, again naturally, far more interested in that aspect than experienced in taking workplace processes forward. Are there exceptions to this approach? One particular exception is of importance, that of the employee who is living with a disability. There is a potential for the provisions of the Equality Act, 2010, to be engaged generally and specifically in relation to the duties placed on an employer to make reasonable adjustments.^{liv} So, for instance, where there is an employee with learning disabilities or one who lives with a mental illness or one who needs assistance with communication, who would benefit from the presence of a support person or advocate or an interpreter, employers should carefully consider the issues involved and reach a decision about the presence of these additional people. The employer may well have to also make a decision about whether the person concerned is additional to the trade union representative or official or fellow worker, as inevitably would be the case with the interpreter or instead of the person who would normally take on the role. If the advocate or support person is going to be present together with the trade union representative or official or fellow worker, it is important that prior to and certainly at the meeting or hearing to confirm specific roles and the expectations and responsibilities for each of the individuals is made clear, mirroring what the *Code of Practice* sets down in respect of the person who would accompany, as set out above. One other circumstance where it might be appropriate to at least consider whether extra support is needed, is for a young worker or apprentice, who by their very nature are new to the workplace and less able to cope and may benefit from parental or other support. There is no legal obligation to consider such a variation of the general approach, but it might be still be considered to be a reasonable approach to the specific circumstances.
- d) Do others have the right to be accompanied, as well as the employee raising the grievance? The straightforward answer appears to be that they do not^{lv}, not even

the person(s) against whom the grievance is raised, because at this stage, they are not facing disciplinary action, where the statutory right would be triggered. Why, then, do many employers extend the right? On a negative note, the extension might be considered to be an example of “gold plating” both legislative provision and the *Code of Practice*, building in complexities that do not need to be added to an already often complex situation and reinforcing the view that grievances are not about resolving matters, but are adversarial in nature, detracting from the overall purpose, which is to address workplace disputes and work towards resolution. On the positive side, employers often want to ensure that their policies and procedures are open and transparent and wish to afford support to employees, particularly those who face allegations regarding their actions and inactions and conduct as part of the grievance, situations which are usually very upsetting and stressful. One might also reasonably argue that if a grievance goes to a “hearing” both the legislation and the *Code of Practice* are not totally clear and that any “worker” can reasonably request to be accompanied. In any event, if the presence of a companion enhances the ability of the person concerned to engage with the process and potentially give better evidence and the result is better management of these matters, it is not difficult to comprehend why the “right” has been extended. This view seems to be confirmed, because after the publication of the *Code of Practice* and *Discipline and grievances at work – An ACAS guide*, ACAS published *Conducting workplace investigations*, which in answering its own question “Can an interviewee be accompanied?”, both takes a far more relaxed approach and, in passing, acknowledges that some employers have extended the right in any event:

“In many cases it will benefit an investigation (and may be work place policy) to **allow an interviewee to be accompanied by a workplace colleague or trade union representative**. An employer might even consider allowing a personal friend or family member to accompany an interviewee if this is reasonable in the circumstances.”^{lvi}
(N.B. *their* emphasis)

- e) This latter publication also expands upon this theme, providing additional reasons for extending the right to others:

" ...

- English may not be their first language and a companion may be in a position to help facilitate the discussion
- having someone there with them can make an interviewee feel more comfortable and more willing to talk openly about the matter
- a companion may be able to help an investigator manage the process more effectively by explaining steps being taken to an interviewee
- it can increase the confidence staff have in a credible process, and therefore may reduce the potential for appeal against any decision that follows."

f) Finally, the documentation refers to a potential, presumably implied, contractual right to being accompanied, in circumstances where not to extend the right would leave them disadvantaged and to extending the right under the "reasonable adjustment" provisions of the Equality Act, 2010 to relevant employees living with a disability.

7.5 **What needs to be disclosed to the person or person(s) against whom a grievance is raised?**

a) Often and quite naturally from their perspective, the employee(s) against whom a grievance is raised will want "chapter and verse", with full documentation in relation to the issues raised prior to responding to them and prior to being met with at a meeting/hearing or as part of a formal investigation. Is it necessary to provide such detail? Even assuming that an employer has "chapter and verse", a clear distinction needs to be made by the requirements placed on an employer in relation to a formal disciplinary hearing, which would only result from a reasonable investigation and after decisions have been made as a result of the information and evidence obtained and a formal decision made to use this aspect of the policies and procedures of the employer and that information that needs to be disclosed as part of the grievance. Whereas in the former case documentation and, usually, witness statements will be provided as part of the "management bundle" prior to the convening of the hearing, in terms of the latter, it would be sufficient to provide in written summary form what the grievance states in detail as part of the invitation to the meeting or investigation. The purpose of the meeting or investigation would be to seek the views of the employee concerned in detail and subsequently to consider those views in determining the validity or otherwise of the grievance.

7.6 Witnesses

- a) There is no information about the place of witnesses in relation to grievances in the *Code of Practice. Discipline and grievances at work – An ACAS guide* does go into more detail, but still does not cover the extent to which employers can ensure that witnesses engage in the process. Can witnesses be compelled to participate? In general terms, no they cannot and from a practical perspective, it is probably not a good idea to use compulsion as it is likely to adversely impact on the nature and quality of evidence given and may encourage the witness concerned to be uncooperative when forced to participate. Interestingly, the guidance produced by ACAS in relation to investigations (See Section 4 above) implies that there may be a contractual point to be considered for non-compliance, although it is unspecified as to whether this applies only to the party who is the subject of the grievance or has a wider application to others, including witnesses. A contractual term which requires employees to engage with an employers' policies and procedures, certainly cannot be precluded and is a feature of many employer-specific policies and procedures, and, equally, an employer may assert that there is an unwritten but implied duty on employees to co-operate with their employer, but the reality of such requirements may fall foul of the limitations already detailed. Whilst relying on a contractual or procedural requirement to co-operate or indeed on the implied duty, arguably, a far more sensible and realistic approach to the issue of reluctance would be information provision about what is involved, persuasion regarding their part in helping to establish facts and provision of support to them so that they can actively participate.

7.7 The Standard of Proof

- a) Whereas the criminal standard of proof demands that criminal courts cannot convict those who appear before them of criminal offences unless the prosecution have proved the case against them "beyond reasonable doubt", the standard of proof to be used in the workplace, including in relation to grievance matters, is the civil one and not the criminal. In this respect the concept of the "balance of probabilities" is key. The employer is required to come to a conclusion that is reasonable in the circumstances, based on the evidence and using the test of the "balance of probabilities", that is, that something is more rather than less likely to have occurred or taken place. Very often in grievance (and, indeed, discipline) cases, it will be one person's word against another. In collecting and analysing both documentary and verbal evidence, it will be for the person investigating, meeting about or hearing a case to make their determination using that standard of proof, very often having to resort to an analysis of why, for instance, person A

would have said or done or been motivated to have said or done what they are alleged to have said or done, rather than not.

7.8 Grievances and Disciplinaries – the crossover

- a) The *Code of Practice* states that where there is an overlapping of grievance and discipline matters:

“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.”^{lvii}

- b) The decision of the employer in relation to such circumstances has to be one that is arrived at after appropriate risk assessment of the situation as both parts of the guidance are equally relevant. It is also important to note the use of the phrase “may be” in both parts, which would indicate the need for a circumspect approach. Clearly if the matters are totally unrelated, then there appears to be no logical reason why the discipline process should be halted, whilst the other matter is dealt with. In circumstances where the matters are so inextricably linked, where much, if not all of the issues are “in play” in respect of both processes, again there appears to be no reason to halt proceedings, given that all matters can be considered together. But workplace matters are rarely that straightforward. It cannot be denied that when some employees are subject to investigation of their conduct and/or performance or attendance, that they consider their best form of defence is attack and they may submit a grievance in order to attempt to halt such actions or “muddy the waters”. However, irrespective of any residual concerns about the commencement of a grievance at that particular point in time being tactical in nature rather than raised for any legitimate purpose, action taken, for instance in order to delay the other process, unless there is any definitive evidence of this, which is highly unlikely, the employer may well have to conclude that the discipline (or other) process is temporarily halted and the grievance dealt with on a timely basis. What, however, should not be forgotten, is that ACAS are not suggesting this course of action as a default position, but rather one that is taken given all of the circumstances prevailing, again indicating that this is a matter for risk assessment.

7.9 “Collective” grievances

- a) The *Code of Practice* makes clear that:

“The provisions of this Code do not apply to grievances raised on behalf of two or more employees by a representative of a recognised trade union or other appropriate workplace representative. These grievances should be handled in accordance with the organisation’s collective grievance process.”^{lviii}

- b) What, though, happens where the employer concerned does not have collective arrangements in place, by not recognising trades unions, for instance? These matters cannot be ignored, in the same way that individual ones cannot. As an alternative, should the matters be dealt with by engaging with each and every individual? That is likely to be time-consuming and wasteful of resources and therefore not something that is likely to find favour in any business. If the matters under consideration are truly the same or very similar, the most reasonable approach to be taken in the circumstances would be for the employer to approach the employees concerned and ask them to appoint a spokesperson for the group who can then be the lead person for the grievance and the grievance can be taken forward in the standard way. Clearly, though, if there are those who are unwilling to take this collective approach, it may prove necessary to deal with the grievance(s) of that or those person(s) on an individual basis.

7.10 Malicious Claims

- a) There are some employees who submit multiple grievances over months and sometimes years, sometimes against the same person, their manager or another person within the organisation or several managers or other people, often where they are the only common denominator. Equally, it is not beyond the bounds of the possible that a person could submit a one-off grievance which is more about targeting an individual rather than seeking to redress a genuine employee grievance. What action, if any should be taken against such employees? Firstly, there is a need to recognise that such employees represent a tiny minority, however, for those organisations that have a written disciplinary policy and procedure, most have provisions within them to deal with those who make malicious claims via grievances, and indeed vexatious claims, to cover off those employees who issue numerous grievances. Where there are no written provisions dealing with these matters, it may well be reasonable to conclude that in making such claims the employee concerned may well be breaching the duty as between employer and employee of mutual trust and confidence and action could be contemplated as a result of

such a breach. Needless to say, such matters need to be dealt with circumspectly, with the employer not either reaching conclusions without proper consideration or making assumptions. Employers will need to properly investigate the grievance allegations as they arise and, in the normal course of doing so reach conclusions that are reasonable in the circumstances, based on the evidence, using the test of the balance of probabilities. If, having gone through that process, the employer reaches the conclusion that the allegations are malicious or there are reasonable grounds for concluding the employee is vexatious, then it would be appropriate to use conduct or disciplinary processes. At the end of those processes, because of the potentially fundamental nature of the misconduct, dismissal may be one of the decisions reached by the employer. As well as general circumspection, the employer needs to consider very carefully taking action when one or more of the “protected” characteristics is the subject of the grievance or where an Employment Tribunal application is made or it is in complementation that one is to be made. In these cases, there is the potential for the employee concerned to argue that they are being subject to victimisation for making their original complaint. It needs to be emphasised that is a potential outcome, not an inevitable one and therefore, proper risk assessment needs to again take place before the course of action is undertaken, including, as appropriate, seeking the views of human resources and/or legal specialists. For those organisations that do not have the provision written of above, it is even more important to seek guidance and advice from specialists in order to come to a conclusion. The absence of such provision does not in and of itself preclude action, given that it is reasonable to argue that a case of malice (or vexatious claims) in relation to a grievance could go to the very heart of the contract of employment of an individual and could therefore put their continued employment at risk. The only mention made in ACAS documentation of malicious claims is within *Conducting workplace investigation*^{lix}, where it is recommended that “...the employee should usually be given the benefit of any doubt”, which is not wholly helpful.

8 CONCLUSION

In writing this book, the importance of employee grievances to the workplace relationship between employer and employee was noted by the legislative provision put in place to ensure that the employer notified the employee of to whom such matters should be addressed if they arose as part of the numerous duties placed on the employer by virtue of the Employment Rights Act, 1996.

In writing the various Sections of the book, a comprehensive introduction to all aspects of handling employee grievances has been provided.

As stated in the Introduction to this work, the primary focus throughout it was to present issues so as to assist operational managers, the key people in an organisation in handling, managing and responding to employee grievances. Where it was necessary and important to do so, it set out and dealt with the role played by human resources specialists in supporting their operational colleagues.

Section 1 of the book defined the term grievance so that readers have an understanding of it and the breadth of issues grievances can involve.

Section 2 provided information about the role of the ACAS and particularly its role in providing a *Code of Practice* and numerous other documentation to assist both employers and employees in relation to grievances, particularly, although not exclusively, *Discipline and grievances in the workplace – An ACAS guide*, discussing and analysing the advice and guidance and considering an holistic approach to the guidance and advice from the diverse sources, differentiating the status of the *Code of Practice* from other material for the purposes of applying it in an Employment Tribunal setting.

Section 3 of the book addressed itself to the issue of writing and embedding grievance policy and procedure in the workplace. Two options were provided in relation to the policy and procedure to be used – either the *Code of Practice* model process as is or appropriately amended or writing policy and procedure specific to an individual organisation. The advantages and disadvantages of both approaches were then discussed. The need to supplement such provision, through reference to and use of ACAS produced materials and resources or through the provision of employer-specific Management Guidance notes was then discussed.

Section 4 discussed the role and place of workplace mediation, including a definition of the term, together with a brief history, how it achieved greater prominence in this field of activity, the advantages and disadvantages of its use, some prerequisites for its use, and how

such an approach could be embedded in an organisation. In general it was concluded that a great deal of benefit would be had from using workplace mediation, both potentially as an alternative approach to resolving workplace disputes and, most certainly as an integral part of the process of endeavouring to do so. In closing this section I provided in summary form what information I share with potential participants in workplace mediation as a practitioner.

Section 5 set out in a great deal of detail how to conduct a workplace investigation of a grievance, greatly aided by the extremely useful *Conducting workplace investigations*, both supplementing the material and commenting on it, where this was felt necessary.

Section 6 was written in order to address the relative paucity of information about conducting or convening grievance meetings/hearings, including when they are for the purposes of appeals from previous stages, the role of the manager within them and the matters that the manager needed to be aware of. A checklist and some detailed guidance and advice was also provided. The provision of such guidance and advice was to contribute to the overall purpose of this book, by thereby better equipping those charged with this task in more effectively taking their work forward.

Section 7 covered a range of issues of major importance in successfully undertaking the management of workplace grievances.

In addition to this conclusion and following it will be found some useful resources, provided at the end.

9 SOME USEFUL RESOURCES

Employers should find the following publications of use to them in dealing with grievances:

Code of Practice on Disciplinary and Grievance Procedures – Code of Practice 1 – [ACAS – March 2015]

Discipline and Grievances at Work – The ACAS Guide [ACAS 03/15]

Help for Small Firms [ACAS] - <http://www.acas.org.uk/index.aspx?articleid=4231>

Conciliation Explained – [ACAS – May 2015]

Conducting Workplace Investigations [ACAS – October 2015] – N.B. ACAS templates for investigations – Plan, Report and letters informing an employee they are subject to a grievance and inviting an employee to a grievance meeting can be found at the following link:

<http://www.acas.org.uk/index.aspx?articleid=5507>

Managing conflict at work – A booklet – [ACAS – 06/14]

The TCM Model Resolution Policy - A new approach for resolving disputes, developing constructive relationships and encouraging positive conversations at work. By David Liddle (TCM Group) – available from www.thetcmgroup.com

Mediation – An Approach to Resolving Workplace Issues – A Guide (Chartered Institute of Personnel and Development [February 2013])

10 ENDNOTES

- i Although the Statement of Initial Employment Particulars may be given in a whole document or in instalments it “shall be given not later than two months after the beginning of the employment.”, s1(2), Employment Rights Act, 1996
- ii Ibid., s3(1)(b)(ii)
- iii p4, *Code of Practice on Disciplinary and Grievance Procedures – Code of Practice 1* – [ACAS – March 2015]
- iv Source: <http://www.acas.org.uk/index.aspx?articleid=1670>
- v Published in March 2015
- vi Source: CAB website [England] - <https://www.citizensadvice.org.uk/about-us/>
- vii Ibid. - <https://www.citizensadvice.org.uk/work/problems-at-work/dealing-with-grievances-at-work/>
- viii Source: Unison website:
<https://www.unison.org.uk/get-help/knowledge/disputes-grievances/grievances//>
- ix s199(1)
- x Op. Cit. *Code of Practice* p1
- xi Ibid, pp10-12 – N.B., whilst there are clear distinctions in law between the terms “employee” and “worker”, the *Code of Practice* appears to use them interchangeably.
- xii Specifically pp39-52
- xiii p45
- xiv *Conducting Workplace Investigations* [ACAS – October 2015]
- xv Ibid, p4
- xvi Ibid, p5
- xvii Ibid, p7
- xviii Ibid, p9
- xix Ibid, p12
- xx Ibid, p141
- xxi Ibid
- xxii Ibid, p18
- xxiii Ibid
- xxiv Epictetus, c55-135 A.D., Greek Philosopher
- xxv Op. Cit. *Conducting Workplace Investigations* p20
- xxvi Ibid, p21
- xxvii Ibid, pp22-4
- xxviii Ibid, p26
- xxix Ibid, p27
- xxx Ibid
- xxxi Ibid, p30
- xxxii Ibid, pp30-1
- xxxiii Ibid, p31

- xxxiv For completeness sake, it needs to be said that the documentation acknowledges that there may be other recommendations, not related to the grievance that should be recorded separately and passed to the appropriate person within the organisation., Ibid, p34
- xxxv Data Principle 5, Information Commissioner's Guide to Data Protection – see the website <https://ico.org.uk/> for fuller details on the subject of data protection.
- xxxvi p7, Doherty, Nora and Guyler, Marcelas, *The Essential Guide to Workplace Mediation and Conflict Resolution* [Kogan Page, 2008]
- xxxvii 2004 No. 752
- xxxviii Regulation 6(1)
- xxxix Regulations 6(2) and (3) respectively
- xl *Better Dispute Resolution – A Review of Employment Dispute Resolution*, [Department of Trade and Industry]
- xli Ibid, p8
- xlii Ibid, p9
- xlili Ibid, p9
- xliv Recommendations 4 and 8, respectively, Ibid. p9 and p10
- xlv Op. Cit., *Discipline and grievances at Work – An ACAS Guide*, p7
- xlvi By adhering to the European Code of Conduct for Mediators, for instance – obtainable from www.civilmediation.org
- xlvi *The TCM Model Resolution Policy - A new approach for resolving disputes, developing constructive relationships and encouraging positive conversations at work*, p5
- xlvi Ibid
- xlvi Ibid, p7
- l Ibid, p9
- li © TPG Consultancy and Management Services Limited
- lii By Professional Mediation Resolutions Limited
- lii s10, Employment Relations Act, 1999.
- liv s20
- lv This interpretation appears to be confirmed in *Discipline and grievances at Work – An ACAS Guide*, p48, where the guidance refers to the worker who is in dispute with the employer and no other.
- lvi Ibid, p19
- lvii Op. Cit. *Code of Practice* p12
- lviii Ibid
- lix Ibid, p32