

Compensation in Discrimination Claims

Module cpdemp0109

Contents

Introduction – course aims and intended learning outcomes	2
General principles of compensation	3
When will compensation be ordered?	3
The basis of compensation	3
Who may be ordered to pay compensation?	3
Injury to Feelings Awards	4
Aggravated Damages	6
Physical and Psychiatric Injury	7
Expenses	8
Loss of Chance	8
Risk of Future Dismissal	9
Compensation for Indirect Discrimination	9
Mitigation of Loss	9
Refusing Offers of Re-Employment	10
Seeking Alternative Employment	11
Becoming Self-Employed	11
Seeking Re-Training	12
Interest on Awards	12
Interest on Claimant's losses	12
Interest in Injury to Feelings Award	13
Interest on other losses	13
Rates of Interest	13
Interest on Unpaid Tribunal Awards	13
Interest following appeals or reviews	14
Failure to Comply with the ACAS Code on Disciplinary and Grievance Procedures	14
How to Handle Discriminatory Dismissals	14
Investigations	14
Notification	15
Further Practicalities Including Right to be Accompanied	15
Legal Representation	16
Reasonable Requests	17
Role of the companion	17
The ACAS Grievance Code	17
Manner in which grievances should be handled	18
The meeting and investigation	18
Right of appeal	19
When does the new Regime apply?	19
How Does the New Code Differ From the Last Regime?	20
Multiple Choice Questions	21

Compensation in Discrimination Claims

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AIMS

This course should provide a basic grounding in the general principles of compensation applicable in discrimination cases including an in depth look at the new ACAS Disciplinary and Grievance codes. The Course is aimed at the employment solicitor with moderate knowledge of employment law and should take approximately 2 hours to complete. Subsequently the course offers 2 CPD points.

INTENDED LEARNING OUTCOMES

On completion of this course, you will have:

- Awareness of the general principles of compensation and when it will be ordered;
- An appreciation of the basis of compensation and who might be ordered to make its payment;
- An understanding of the range of heads of compensation;
- Increased understanding of the principles of mitigation of loss;
- Up to date knowledge of interest calculations;
- Awareness of the practicalities of handling discriminatory dismissals;
- An overview of the new ACAS Grievance Code.

General principles of compensation

The principles of compensation in discrimination cases share a number of features in common with other employment tribunal cases (such as unfair dismissal claims), as well as some civil claims such as personal injury, compensation in discrimination cases however, has a wider scope.

When will compensation be ordered?

Where a tribunal finds that there has been unlawful discrimination, it must make whichever of the following orders it considers "just and equitable".

- a declaration of the rights of the parties;
- an award of compensation; and/or
- a recommendation that the respondent takes particular action to obviate or reduce the effect of the discrimination on the claimant.

The Claimant will add to his Originating Application contained in the ET1 form which remedy he seeks. In most, if not all cases, the claimant will be seeking compensation.

The basis of compensation

Although the power to award compensation only applies where the tribunal considers such an award would be "just and equitable", the calculation of the award itself is not based on what is just and equitable, but seeks to place the Claimant in a position, which he would have been in but for the acts(s) of discrimination. Also, unlike in most unfair dismissal cases, there is no upper limit on compensation. The main difference between compensation awarded in discrimination cases is that a sum can be given on top of past and future losses for 'injury to feelings'. This was once also obtainable for unfair dismissal cases.

Who may be ordered to pay compensation?

Compensation payable in discrimination cases may be payable by the employer and or any individual the Claimant believes discriminated against him. This person may be a

third party or a fellow employee. If the Claimant is successful against more than one of these parties the tribunal must apportion liability. Looking at the harm suffered it is up to the tribunal to assess the degree to which the Respondent is responsible for the harm suffered (*Armitage, Marsden and HM Prison Service v Johnson* [1997] IRLR 162 (EAT)).

When apportioning the amount of compensation joint and several liability awards against individual respondents can be made *Way and anor v Crouch* [2005] IRLR 603 (EAT).

Injury to Feelings Awards

With the exception of the Equal Pay Act 1970, anti-discrimination legislation provides for payment of compensation for injury to feelings suffered by claimants as a result of the discrimination.

An award of injury to feelings is not a punitive award, but is intended to be compensatory. This means that tribunals should not take into account adverse feelings they may have towards the respondent as a result of their conduct so as to inflate the award.

An award for injury to feelings is separate from an award of compensation for financial loss. A claimant can therefore recover for injury to feelings even when they have suffered no financial loss.

The burden is on the claimant to show that their feelings have been injured, and to what extent, and it would be sensible for a claimant always to seek some form of injury to feelings award in the claim form. It would, however, be extremely rare for a tribunal to make a finding of discrimination, but not make an award for injury to feelings. A claimant does not need to show medical evidence of injury to feelings, as it is not a question of injury in a medical sense. It is more of a subjective analysis of the claimant's feelings as a result of the discrimination and it is for the tribunal to translate this subjective analysis into a cash equivalent.

There are a number of factors to consider in each case. These include the vulnerability of the claimant, the degree of hurt, distress or upset caused, the position of the person

who was found to be discriminating and the seriousness of the treatment. The size of the respondent's business is irrelevant, as the tribunal is only concerned with the effect on the claimant.

Some examples of the factors which tribunals have taken into account are:

Personal characteristics. If a claimant reacted to the discrimination more severely than others, then this should be accounted for regardless whether the discrimination could be viewed "objectively" as less serious.

Any medical condition from which the claimant is suffering.

Factors such as panic attacks, stress, loss of confidence and interference with personal relationships.

The nature of the claimant's job.

The manner in which the respondent dealt with any grievance brought by the claimant.

The value of injured feelings: the Vento guidelines

The anti-discrimination legislation does not provide guidance as to how a tribunal should carry out this calculation. This has been left to the tribunals and Courts to provide guidance.

The principal case providing guidance for the assessment of compensation for injury to feelings awards is *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, [2003] IRLR 102. This set clear guidelines for the amount of compensation to be given for injured feelings and set out three bands of potential awards.

Top band of £15,000 - £25,000 for cases in the most serious category, such as where there has been a lengthy campaign of harassment. Only in the most exceptional cases should an award of injury to feelings exceed £25,000.

Middle band of £5,000 - £15,000 for serious cases which do not merit an award within the highest band.

Lowest band of £500 - £5,000 for less serious cases, such as a one-off incident or an isolated event.

Awards should not be so high as to amount to a windfall, but neither should they be so low as to diminish respect for the law. They should bear some broad similarity to the range of awards in personal injury cases. Tribunals should also take account of the "value of the sum in everyday life", either in terms of what it can buy, or its value in relation to earnings (*Armitage & others v Johnson [1997] IRLR 162 (EAT)*); approved in *Vento*). However, there is no minimum award (*Greig v Initial Security Ltd, UKEATS/0036/05/LA*).

It has been made clear in the recent case of, *Corus Hotels Plc v Woodward & Anor [2006] UKEAT 0536/05/1703, 17 March 2006*, that an injury to feelings award is not punitive. In *Vento*, Mummery LJ described the kind of matters which can be the subject matter of compensation for injury to feelings:

"Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression" (*paragraph 50*).

The tribunal in *Woodward* was influenced by the employer's discriminatory conduct and effectively adopted a punitive approach in assessing the amount of compensation for injury to feelings. The EAT confirmed that an injury to feelings award is not a punitive award *Corus Hotels Plc v Woodward & Anor [2006] UKEAT 0536/05/1703, 17 March 2006*.

An example of an award under the lowest band is that of *Thomas v Eight Members Club and Anthony Killip, ET/2202603, 22 November 2007* in this case a Claimant who was told that she was 'too young for the job'. She was awarded £1,500 in compensation.

The guidelines for assessing compensation in discrimination cases laid down by the Court of Appeal in *Vento v West Yorkshire Police CA 2002* (above) apply also to assessment of compensation in whistle-blowing cases (see *Virgo Fidelis Junior School v Boyle EAT 2004* on 23rd January 2004).

However, The EAT in the conjoined appeals of *Allan and Others v Newcastle City Council* and *Others and Degnan and Others v Redcar and Cleveland Borough*

Council held that compensation for non-economic loss, such as injury to feelings, is not available in equal pay claims brought under the Equal Pay Act 1970.

In the rare instance of there being two types of discrimination then the tribunal must consider the impact of both separately. Where different forms of discrimination arise from the same discriminatory acts, it is appropriate for the tribunal to assess the effect on injury to feelings on a composite basis. However, where different forms of discrimination arise out of different discriminatory acts (as in this case), the tribunal must assess the impact to injury to feelings separately with respect to those acts.

Having made its initial assessment, the tribunal must then look at the total figure to ensure that it is proportionate overall and does not involve double counting. *Jumard v Clywd Leisure Ltd and others* UKEAT/0334/07

Aggravated damages

Aggravated damages are available for discrimination claims *see Vento*. Whilst not specifically provided for in the legislation, the tribunals and Courts have followed the usual tortious principles in establishing this principle. They are a stand alone head of compensation and should not be rolled up into the award for injury to feelings award. They are therefore additional to any amount the tribunal may award under the Vento guidelines set out above (*Scott v Commissioners of Inland Revenue* [2004] IRLR 713 (CA); *Crofton v Yeboah* [2002] IRLR 634 (EAT)).

Aggravated damages are awarded in the most serious cases where the respondent has acted in a "high-handed, malicious, insulting or oppressive manner in committing the act of discrimination" *Alexander v Home Office* [1998] ICR 685 [1988] IRLR 190, CA. Typically this is seen where there are clear examples of malice or bad intention on the part of the respondent, and indeed intention is the vital factor. The Claimant must show that he had knowledge or suspicion of the aggravating conduct or motive and that such knowledge caused his hurt feelings to be aggravated *Ministry of Defence v Meredith* [1995] IRLR 539, EAT.

Again, aggravated damages are designed to compensate the claimant where the injury has been aggravated and not to punish the respondent. There must also be a causal link between the aggravating act complained of and the injury or loss suffered

by the claimant. Expert evidence may well be required to establish this. Of course permission must always be requested of the tribunal before this evidence is adduced.

Aggravated damages have been awarded in the past when:

Attempting to cover up or trivialise the wrong-doing.

The manner of conducting internal procedures, including failure to investigate complaints or take them seriously, (*Armitage, Marsden and HM Prison Service V Johnson [1997] IRLR 162, EAT £7,500 awarded*).

Promoting or otherwise rewarding the perpetrators of the discrimination.

Using the claimant as a scapegoat.

The manner of defending the proceedings, including intimidating the claimant during litigation, for example, through oppressive and unwarranted "costs warning letters", (*Zaiwalla & Co v Walia [2002] IRLR 697 EAT: £7,500 awarded*).

Continuing failure to correct a problem which has led to the discrimination.

The Respondent's unsatisfactory answers to a statutory discrimination questionnaire (*City of Bradford Metropolitan Council v Arora [1989] IRLR 442, EAT*).

The tribunal is permitted to order aggravated damages even if the aggravating action is not in itself discriminatory.

Physical and Psychiatric Injury

In *Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170, [1999] IRLR 481, CA* the Court of Appeal confirmed that Claimants can recover damages for personal injury caused by unlawful discrimination.

In principle, injury to feelings and psychiatric injury are stand alone heads of loss but in practice they often overlap which can precipitate double recovery.

General damages for pain and suffering and loss of amenities are usually assessed in accordance with the 'Judicial Studies Board Guidelines'.

Expenses

Expenses incurred as a direct result of the discriminatory act can also be recovered. These may include any out-of-pocket expenses, such as:

Medical bills resulting from depression or other injury caused by the discrimination.
Cost associated with seeking new employment, such as travel, telephone and even accommodation expenses.

The cost of additional training, where the claimant is otherwise unable to obtain equivalently-paid employment within a reasonable time (see, for example, *ICTS (UK) Ltd v Tchoula* [2000] IRLR 643 (EAT)).

Expenses incurred in setting up in business, if the employee reasonably chooses to do this rather than seek employment elsewhere (see, for example, *United Freight Distribution Ltd v McDougall* EAT 218/94).

Child Care Costs

Child care costs which would have prevented the Claimant mitigating her loss by working should be set off against the compensatory award regardless if a third party paid them *Ministry of Defence v Cannock* [1994] ICR 918, [1994] IRLR 509, EAT).

Loss of Chance

The correct test the tribunal should adopt under this head is:

But for the discrimination, what was the chance that the Claimant would have remained in the original job for the period of the compensation claim? In *Ministry of Defence v Cannock* [1994] ICR 918, IRLR 509, EAT it was stated that the calculation of loss should be dealt with as an evaluation of the loss of chance.

Risk of Future Fair Dismissal

Often the tribunal will be asked to consider whether the Claimant would have been dismissed anyway despite the discrimination. For example, the Respondent may bring evidence to show that the Claimant would have been made redundant in any event within a matter of weeks. The tribunal may reduce the award by 20 per cent if it thinks that that is a fair estimate of the chances of the Claimant being dismissed.

Compensation for Indirect Discrimination

Since March 25 1996, tribunals have had the power to award compensation for unintentional indirect discrimination in cases of sex discrimination and equal pay (see SDA, s.65(1A) and 1B inserted by the Sex Discrimination and Equal Pay (Miscellaneous amendments) Regulations 1996 (SI 1996, No.438).

There are similar provisions in cases of unintentional indirect sexual orientation or religion or belief discrimination (SOR 2003, reg. 30(2) and RBR, reg.30(2)).

With race discrimination cases, the RRA 1976 s57(3) provides that compensation may not be awarded in cases of indirect discrimination unless it is shown that a discriminatory requirement or condition was applied with the intention of treating the Claimant less favourably on racial grounds. No provision is made where the complaint is brought under the RRA 1976, s 1 (1A) i.e where the complaint relates to a 'provision, criterion or practice'. However such an intention may be inferred where it is established that the employer deliberately took steps or applied requirements knowing the discriminatory effect they would have (JH Walker Ltd v Hussain [1996] ICR 291, [1996] IRLR 11, EAT).

Mitigation of loss

A claimant is expected to take reasonable steps to mitigate their loss, usually by looking for a new job if the discrimination has resulted in them being out of work, and by limiting their out-of-pocket expenses to those which are reasonably incurred. The issue of mitigation is a question of fact for the tribunal, and the respondent has the burden of proving that the claimant has not mitigated their loss. This would include providing evidence of any jobs which the respondent alleges the claimant could have applied for or undertaken. If a tribunal finds that a claimant has not taken reasonable steps to mitigate their loss, then financial compensation can be reduced by a figure which the tribunals considers appropriate, depending on the extent of their failure.

Refusing Offers of Re-Employment

In *Wilding v British Telecommunications plc [2002] IRLR 524* the Court of Appeal upheld that tribunal's finding that an employee had unreasonably refused the employer's offer of re-employment, and had therefore failed to mitigate his loss. In that case the claimant had stated he wanted to go back to work and BT had made an offer of part time work (after the tribunal decision on liability, but before a remedies hearing). The claimant, after initially seeking re-employment, then rejected the offer on the basis that he did not have trust and confidence in BT as an employer. The parties had exchanged schedules of loss between the offer of the job and the claimant's refusal, and BT's schedule was the "final straw".

The Tribunal considered all the circumstances, including the events before the offer was made. In particular they considered the claimant's desire to return to work and the unavailability of other work, and concluded that the decision to reject the offer was unreasonable. Can the claimant refuse work?

Refusing other employment, merely because it involves lower wages, can be a breach of the duty. In *Daley v A E Dorsett (Almar Dolls) Ltd [1981] IRLR 385*, the tribunal held that a decision not to take a job on a lower wage was reasonable. Whilst the EAT upheld this, they did stress that it would only be in special circumstances that such a decision would be reasonable and each case must be considered on its own facts.

A dismissed employee is however, entitled to spend time looking for other employment of equivalent standing before applying for employment at a lower level, without been deemed to be acting unreasonably (*Yetton v Eastwoods Froy Ltd [1966] 3 All ER 353*). The question of how long they should continue before looking for lower paid work is a matter for the tribunal. In *Yetton* the claimant continued for six months looking for employment at the same level. Although the court suggested that he might perhaps have lowered his expectations earlier, it did not find that there had been any failure to mitigate.

Seeking Alternative Employment

A Claimant has a duty to mitigate their loss and a tribunal should examine all relevant facts when determining whether this has been achieved successfully. Some

Claimants may argue that where they live there are few jobs of the type they are trained to do in their area and therefore the compensation period should be extended to allow for them to find a suitable role. Respondents have been known to counter this argument by researching newspapers and job agencies in that area to find roles the Claimant could undertake. These advertised roles can then be sent to the Claimant's representative or brought to the tribunal at a compensation hearing.

Becoming self-employed

Setting up a business and being self-employed can also be a reasonable step to have taken (see *Gardiner-Hill v Roland Berger Technics Limited* [1982] IRLR 498 (EAT) and *Dore v Aon Ltd* [2005] IRLR 891 (CA)). Again, this will depend on the circumstances and, if reasonable, the claimant will be entitled to compensation to reflect the costs and expenses incurred as a result, as well as the loss of earnings over the period in which the business is set up. Any earnings from the new business or other sums which have been earned during the mitigation period would be deducted from this combined sum.

In *Gardiner-Hill*, the claimant set up his own business after being dismissed, rather than looking for a new job. The tribunal held that he had not mitigated his loss, and as he had spent 80% of his time setting up the new business, his loss should be reduced by 80%. The EAT disagreed, and said that given his circumstances as sole managing director of the respondent for 16 years it was open for him to consider setting up his own business to use that experience. The tribunal had not considered all the circumstances, and the respondent had not provided evidence to show that doing so was unreasonable.

Seeking Retraining

Changing career has also been held to be a reasonable step. In *Orthet Ltd v Vince-Cain* [2004] IRLR 857, the EAT held that a claimant's decision to change career and undertake a four-year university course was reasonable. In the circumstances the employer was unable to prove that there was other available work which the claimant could, or should, have done. She took the decision to re-train as a consequence of

the dismissal, and she continued to look for other work whilst undergoing the course.

On her evidence she would have stopped the course if she had found suitable employment. The EAT also held in *Tchoula v ICTS (UK) Ltd [2000] ICR 1191* that a security guard who was dismissed was entitled to retrain in IT, as his dismissal by the respondent had deprived him of the clean employment record he needed to continue to work in security.

Interest on Awards

Interest on claimant's losses

Interest in discrimination awards is set down in the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations SI 1996/2803*. These give the tribunal the power to award interest on the claimant's losses as part of the compensation for discrimination. The claimant does not have to specifically claim for the interest as the tribunal is bound to consider it in any event (*regulation 2(1)*).

There are two ways of approaching interest. The parties can either agree the amount to be awarded or the tribunal can calculate it in accordance with the process set out in the Regulations (*regulation 2(2)*).

Interest on Injury to Feelings Awards

Under the Regulations, for injury to feeling awards, interest runs from the date of the discriminatory act to the date of calculation (*regulation 6(1)(a)*).

Interest on other losses

For other awards, including past financial losses, the interest runs from the "mid-point" date to the date of calculation (*regulation 6(1)(b)*). The mid-point is calculated as the date halfway between the discriminatory act and ending on the calculation

date (usually the judgment date). This means that interest cannot be given for future loss of earnings, as they are attributable to the period after the date of calculation.

Rate of interest

The rate payable in England and Wales is that prescribed for the Special Investment Account under regulation 27(1) of the Court Funds Rules 1987 - currently 6%. In Scotland it is currently 8%, set by the regulation 3(2) of the Act of Sederunt (Interest on Sheriff Court Decrees or Extracts) 1975. Interest accrues from day to day, and is simple rather than compound.

The tribunal may refuse to award interest, or may apply a different calculation, if it believes that serious injustice would otherwise result (*regulation 6(3)*).

Interest on unpaid tribunal awards

Interest is payable on unpaid awards under the Employment Tribunals (Interest) Order 1990. Interest accrues from the day after the decision day onwards unless the full amount of the award is paid within 14 days after the relevant decision day (*regulation 8, Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996*).

Interest will be calculated in accordance with the rate prescribed by section 17 of the Judgments Act 1838, which is currently 8% (*article 4, Employment Tribunals (Interest) Order 1990*).

Interest following appeals or reviews

Where an award of compensation is varied on appeal, or following a review by the tribunal, interest still runs from the day after the original tribunal decision. However, where the original decision was to award **no** compensation, but compensation becomes payable following an appeal or review, interest runs from the day after the decision to order compensation (*articles 2, 5 and 8, Employment Tribunals (Interest) Order 1990*).

Failure to Comply with the ACAS Code on Disciplinary and Grievance Procedures

If an employee brings a successful claim for unfair dismissal or a number of other common types of claim (including those related to discrimination, breach of contract, working time, detriment, and deduction of wages- the list of claims to which this regime applies is set out in the new Schedule A2 of TULRCA) arising out of dismissal or disciplinary action for misconduct or poor performance, there is an impact on the level of compensation awarded if either party failed to follow the Code. If the employee unreasonably failed to follow it, the tribunal may reduce their compensation by up to 25%.

If the employer unreasonably failed to follow it, the tribunal may increase the employee's compensation by up to 25%. The employment tribunal must decide what uplift or reduction would be 'just and equitable' (*Section 207A, TULRCA, as inserted by section 3, EA 2008*).

How to Handle Discriminatory Dismissals

The following procedure must be followed if an uplift of up to 25% is not to be applied to any award of compensation.

Investigations

It is a traditional feature of fair dismissals that there has been a reasonable investigation undertaken. Any failure to conduct such enquiries may lead to a finding of unfair dismissal or discrimination claims. This principle of following a fair investigatory procedure is enshrined in the Acas Code. This may involve investigatory meetings with the employee under investigation and the collation of other evidence including witness statements. Witness statements and evidence should be shown to the Claimant prior to a disciplinary hearing so that he might be equipped to answer the case against him. Crucially, any investigatory meeting should not result in disciplinary action without a disciplinary hearing.

If paid suspension is necessary during the investigation, this should be as brief as necessary and the employer should make clear that this is not in itself a form of disciplinary action.

Notification

If there is a case to answer, the employee should be notified in writing of the alleged misconduct or poor performance and its possible consequences, setting out detailed allegations including, the risk of dismissal if it exists. In essence, there must be sufficient detail to enable the employee to respond at a disciplinary hearing. Any written evidence, which may include witness statements, should be provided to the employee.

Further Practicalities Including Right to be Accompanied

The notification should set out the time and place of the disciplinary hearing which should be held as promptly as possible, while ensuring the employee has reasonable time to prepare their case. It should also set out the employee's right to bring either a fellow worker or a trade union representative to the hearing.

Section 13(4), EReIA. States that Sections 10 to 15 of Employment Relations Act, give workers and employees a statutory right to be accompanied by a trade union representative or a fellow worker at a disciplinary hearing. Disciplinary hearings for the purposes of this right are hearings (including meetings under a DDP) that could result in:

A formal warning being issued to a worker;

The taking of some other disciplinary action, such as suspension without pay, demotion or dismissal; or

The confirmation of a warning or some other disciplinary action, (as would be the case with an appeal hearing).

Meetings merely to investigate allegations are therefore not 'disciplinary hearings' but this does not mean that they should transform into one. If it becomes plain

during the course of such a meeting that disciplinary action against the worker may be appropriate, a separate formal hearing should be arranged where all the usual format of a disciplinary meeting should be followed.

The companion should be someone who is either:

Employed by a trade union of which they are an official;

An official of a trade union (not employed by the union) whom the union has certified in writing as having appropriate experience of, or as having received training in, acting as a worker's companion at such hearings; or

Another of the employer's workers.

Section 10(3), EReIA. states that the worker does not have to be a member of the trade union to which the official belongs and there is no requirement that the employer should recognise the trade union.

Legal Representation

There is no general right under UK law for an employee to have a qualified legal representative at a disciplinary hearing but there are rare circumstances when this may be appropriate. In the case of, *Kulkarni v Milton Keynes Hospital NHS Trust [2008] IRLR 949 (QBD)* the High Court refused to grant a declaration that a doctor was entitled to be represented by a lawyer at a disciplinary hearing.

Employees may have a right to legal representation at the hearing in certain limited circumstances as a result of the Human Rights Act 1998 (HRA) and article 6 of the European Convention on Human Rights. In *R (on the application of G) v The Governors of X School & another [2009] EWHC 504* a teacher was held to be entitled to legal representation at a disciplinary hearing because of the gravity of the allegations which, if upheld, would have led to his employer reporting him to the Secretary of State as being unfit to work with children.

Reasonable Requests

The right to be accompanied only applies where a worker 'reasonably requests' to be accompanied at the hearing. The legislation does not address the question of when such a request would not be reasonable, but the Acas Code provides some assistance at paragraph 15: What is reasonable will depend on the circumstances of each individual case. However, it would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing nor would it be reasonable for a worker to ask to be accompanied by a companion who lived miles away if someone suitable and willing was available on site.

Role of Companion

The companion must not answer questions on behalf of the worker or do anything to prevent the employer putting forward their case (section 10(2B)-(2C), EReIA 1999). The companion may however, address the disciplinary hearing (including putting the worker's case, summing up, and responding on the worker's behalf to any view expressed at the hearing).

The ACAS Grievance Code

The new Code is not without teeth; If an employee's claim is successful but either the employer or the employee failed to follow the new Code, the level of compensation awarded to the employee may be affected. If the employer unreasonably failed to follow the Code, the tribunal may increase the employee's compensation by up to 25%. If the employee unreasonably failed to follow it, the tribunal may reduce their compensation by up to 25%. The tribunal must decide what uplift or reduction is suitable based on what would be just and equitable. (*Section 207A, Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), as inserted by section 3, Employment Act 2008 (EA 2008)*).

This regime does not apply to all claims but does apply to the types of claim most commonly brought in the tribunals (including those related to discrimination, unfair dismissal, equal pay, breach of contract, working time, detriment, and deduction of

wages). The full list is set out in the new Schedule A2 of TULRCA.

Manner in which grievances should be handled

Should the grievance be in writing?

A grievance can be any problem or complaint that an employee raises with the employer. The employee should raise the grievance in writing with a manager or if it relates to their line manager, the grievance should be raised with another manager. A failure to raise the grievance in writing does not preclude an employee bringing a tribunal claim about the matter. However, the employee may recover less compensation if no grievance is raised.

The Meeting and Investigation

A meeting should be held to allow the employee to explain their grievance and how they think it should be resolved. Managers, employees and their companions should make every effort to attend the meeting. If the matter needs further investigation, the employer should consider adjourning the meeting and resuming it after the investigation has taken place. When the meeting is concluded, the employer should communicate its decision in writing without delay, including any plan of action it intends to take to resolve the grievance. A failure to deal with a grievance could lead to an uplift on any award made and lead to complaints of constructive dismissal or discrimination.

It should be remembered that Under *section 10, Employment Relations Act 1999*, An employee or other worker has a statutory right to bring a companion, whether a fellow worker or a trade union representative to a grievance meeting, where the complaint is about a "duty owed by the employer to the worker" The employee must make a reasonable request to be accompanied. What is reasonable will depend on the circumstances, but the Code suggests that it will not normally be reasonable for the companion to be someone whose presence would prejudice the meeting, or someone from a remote workplace if a suitable alternative candidate is available at the same site.

Right of Appeal

If the employee is not satisfied with the outcome, they should appeal in writing, specifying the grounds of their appeal. If they bring a tribunal claim without appealing, any compensation they are awarded may be reduced. The employer must inform the employee that they have a right of appeal when they give the decision of the grievance meeting. If not, the employer faces having to pay an increase of up to 25% on any award made.

The appeal should be dealt with impartially at a hearing, which should be conducted by a manager who has not been previously involved. The employee should be informed in good time of the time and place of the appeal hearing and may bring a companion. The employer should communicate the final decision in writing without unreasonable delay. The appeal officer should look into the appeal points raised in as much detail as possible

When Does the New Regime Apply?

There are transitional provisions governing whether the old or new regime applies. In general, any grievance concerning facts which occurred wholly before 6 April 2009 will fall under the old regime and any grievance which concerns facts occurring wholly on or after that date fall under the new regime. For most grievances about a state of affairs spanning that date, the old regime will continue to apply if the grievance or claim is submitted on or before 4 July 2009, although in some cases involving equal pay, redundancy or industrial action the date is 4 October 2009 (*Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008*). See *Checklist, Employment Act 2008 transitional provisions: grievance procedures*.

How Does the New Code Differ From the Last Regime?

Best practice advice to employers and employees in dealing with grievances in the workplace should not change greatly in the light of the reformed law. The rules on

admissibility, time limits and compensation have changed:

The submission of a grievance under the old regime triggered a three-month extension of time to bring a tribunal claim. There is no automatic extension of time under the new.

An employee who has not submitted a grievance is no longer barred from bringing a claim.

Under The new Code, it applies to any grievance and an "unreasonable" failure to follow it can affect compensation. This replaces complex provisions under the Dispute Resolution Regulations governing when the statutory procedures applied and when they were excluded. Any breach of an applicable statutory grievance procedure would enable a tribunal to adjust compensation.

Compensation under the old regime could be adjusted by 10-50%. The adjustment under the new regime is 0-25%.

Multiple Choice Questions

Question 1

Under the 'Vento' guidelines cases that fall into the lowest bracket for injury to feelings are:

- very serious in nature and involve a series of events
- Are only for cases where harassment is a feature
- Are for one off or isolated incidents of discrimination.

Question 2

With an injury to feelings award the burden is on the:

- Claimant to show the hurt and injury they have been caused
- The Respondent to show that the Claimant has suffered no injury to feelings.
- There is no burden on the Claimant to show that they have suffered.

Question 3

Aggravated Damages,

- Form part of an award of injury to feelings
- Are a stand alone head of compensation

Question 4

The duty to mitigate exists when:

- In all discrimination claims
- A duty to mitigate your losses in discrimination claims exists only when dealing with DDA claims?
- The duty only exists when the claim is based on race.

Question 5

Seeking Re-training is:

- A form of mitigation of loss
- Is not considered to be good mitigation.
- Expected in all cases

Question 6

Refusing an offer of re-employment offering less pay is:

- Not considered a form of mitigation of loss.
- Will be considered by most tribunals as a possible form of mitigation of loss.
- Will mean the Respondent pays no compensation

Question 7

You can only claim expenses:

- In discrimination claims
- Unfair dismissal claims
- You can only claim expenses in DDA claims

Question 8

If the employer fails to adhere to the ACAS Guide on Discipline and grievances at work:

- Compensation can be increased by up to 25%
- Nothing the Guide is for assistance only.
- There will be an automatic unfair dismissal

Question 9

The new ACAS code applies to:

- Disciplinary situations only
- Redundancy Situations only
- Both disciplinary and redundancy situations

Question 10

A worker may bring a lawyer to a disciplinary hearing:

- In all types of disciplinary meetings
- Never
- In rare occasions when human rights issues apply

Question 11

A reasonable request for accompaniment at a disciplinary meeting includes:

- A work colleague or union representative who lives miles away
- A work colleague or union representative who may prejudice the hearing
- A work colleague or union representative but it depends on the circumstances of the case

Question 12

A companion at a disciplinary hearing may:

- Answer questions on behalf of the worker being accused
- Talk over the employer's representative
- Sum up on behalf of the Claimant