

# REPRESENTATION



# UNISON GUIDE

## **WARNING**

At the time of publishing this edition we are aware that the Coalition Government is considering proposals to severely reduce the rights of employees to take claims to an Employment Tribunal. This follows publication of their consultation "Resolving Workplace Disputes"

These threats include:

- Raising the qualifying service for unfair dismissal protection from one year's service to two years
- Requiring a pre-claim conciliation by ACAS before any claim could progress to an Employment Tribunal
- Introducing a fee of around £250 simply to lodge a claim with the Employment Tribunal
- Introducing a fee of around £1000 to request a hearing before the Employment Tribunal

UNISON and the TUC are campaigning against these changes. You can find more information, including responses to the consultation, on the UNISON and TUC websites. It is understood that the Coalition government intends to introduce their changes from the middle of 2012.

If these changes are introduced then a new edition of this guide will be issued. If you are unsure about whether any of these changes have been introduced and affect a case you are dealing with, please seek advice from your regional office immediately.

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# Introduction

Many people join UNISON because they fear that one day something will go wrong at work and they will need the help of a UNISON representative.

UNISON's reputation is built upon the experiences of those members who have needed our help in the past. Our ability to recruit or retain members is influenced by our performance when representing members.

With the right approach from us when helping members with casework today, UNISON members will deal better with similar challenges in the future, becoming better organised, taking control of their work environment and tackling the root cause of grievance or disciplinary problems.

This guide allows UNISON representatives to help UNISON members when they need it, and also aims to set a standard for UNISON representation.

It begins with a statement of members' rights and branches may wish to copy the statement in guidance given to members who seek our help. The guide will help you through each stage of assisting a member with a grievance or disciplinary matter.

Representation can sometimes be a complex matter. For example, a member may want to complain about another; or a member might seem to ask for the impossible; or there is a problem or conflict of interest involving the UNISON rep; or there is a recurrent problem that we need to deal with as a collective action. This guide seeks to help branches find a way through these difficult areas, and more. Please

read it and use it as a point of reference.

Please ask your branch secretary or branch education co-ordinator to ensure that you have the training necessary not only to use this guide but also to receive your credentials as an accredited representative under the Employment Relations Act 1999.

Knowing you have helped a member overcome a distressing problem at work is one of the best feelings there is. I want to add my thanks to all UNISON reps for the work you do. You create our reputation as a union that cares for and effectively supports our members. I am sure that this handbook will help you.



Dave Prentis  
*General Secretary*



# 1. The rights of members to advice and representation

## 1.1 Principles

**Every UNISON member has the right:**

- to seek help on matters relating to their employment

- to be treated with respect and integrity

- to be helped by a UNISON

representative who has been trained to the standards set out in this guidance

- to understand that no action or representation will be made on the member's behalf without that member's agreement

- to expect confidentiality unless otherwise agreed.

**In the workplace, every UNISON member has the right:**

- to seek advice about workplace problems, and representation as appropriate

- to receive help from UNISON to ensure their employer gives them a fair hearing.

### 1.1.1 Stewards & workplace representatives

Advice and representation will usually be provided by the member's elected workplace representative. It is UNISON's job to ensure that its "front-line" officials are competent and confident to carry out this vital job. UNISON provides training to ensure that its representatives can carry out their legal right to represent UNISON members as Accredited Representatives, under the Employment Relations Act 1999.

1.1.2 Your job is to help the member – not to act in the member's place; to empower

the member to articulate their arguments; to work with the member to try to solve the problem; to give honest advice and guidance; to seek guidance when you are unsure how to proceed; and to represent your member on an agreed basis.

## 1.2 Grievances

1.2.1 **A grievance procedure** is used when an employee believes that her or his rights have been infringed by the employer. Where UNISON is a recognised trade union we will usually have negotiated a grievance procedure with the employer. It should ensure that the complaint is heard and responded to by the management quickly.

1.2.2 Grievances come in many different forms, including: a complaint that a manager has not treated the employee fairly in some day to day matter; issues that arise from a change in role, a workplace reorganisation, even redundancy; regarding claims and issues of equal treatment as a part-time worker, as a woman, as a disabled worker, for example; or a complaint of bullying, harassment or discrimination.

1.2.3 Some special types of grievance may have distinct grievance procedures to deal with that sort of problem – a harassment procedure, a dignity at work procedure, etc.

1.2.4 Whatever the grievance, it must be lodged with the employer in writing, as soon as possible, and within any time limits set out in the local grievance procedure

The grievance is usually best written by your member but of course you are entitled to assist the member in the preparation of the grievance if they request your assistance.

1.2.5 Employers must provide both an initial face-to-face meeting to resolve a grievance and the right of appeal. Both meetings must be held at times and places that are reasonable for the employee and reasonable provision must be made for anyone who is disabled. The meetings must allow both sides to explain their case. Employees are entitled to be accompanied by a UNISON representative at both stages. At the conclusion of the initial hearing and any appeal (where applicable) the employer is obligated to inform the employee in writing of any action it proposes to take as a result of the grievance which has been raised.

**ACAS has produced a code which Employment Tribunals will have reference to when determining whether parties have followed the correct procedures for grievances and disciplinary cases. Failure by an employee to follow the correct process could lead to a reduction of 25% in the award of compensation made by an employment tribunal if the employee is successful at a hearing. A copy of the Code (“Disciplinary and Grievance Procedures”) and an associated guide can be obtained from the ACAS website ([www.acas.org.uk](http://www.acas.org.uk)). In dealing with grievance or disciplinary matters, it is important that you are aware of this Code and how it might impact on the process to be followed.**

### 1.2.6 The job of the UNISON representative is:

- to check that the member has completed all relevant sections of the UNISON caseform; to complete the steward’s details on tear-off slip at

the end of the form and to return that part to the member

- to confirm that the member is up to date with UNISON subscriptions at the correct rate

- to ensure the grievance has been submitted to the employer in writing

- to ensure the appropriate procedure is used properly

- to ensure that the member receives a fair and reasonable response as quickly as possible

- to discuss the case with the member, advising on the options available and whether or not the grievance can be substantiated

- to accompany the member at a grievance hearing

- to help the member put the case effectively (although depending on the grievance procedure the representative may not be entitled to answer questions on behalf of the member)

- to protect your member’s legal rights. Alert your regional office (or ask your branch secretary to do this) to any grievance that has not been resolved 6 weeks from the event that caused the grievance, and immediately in any case where the member complains of discrimination. It may be possible to pursue some cases that fail at employer level through the Employment Tribunals [see box after section 2.6.2]. The claim must be lodged with the Employment Tribunal within three months less one day of the “trigger event” that caused the grievance. To ensure UNISON’s support, this can only be done by UNISON’s solicitors, so you need to act promptly to refer the caseform to the region. *You must not wait for the employer’s procedures to be completed before asking the Region to lodge an Employment Tribunal claim. This may mean that cases will be lodged before the employer level procedures have been exhausted. This is because a member only has 3 months less one day from the ‘trigger’ event*



(e.g. act of discrimination, less favourable treatment, dismissal etc) to lodge a claim at an employment tribunal.

1.2.7 Note. There will be occasions when members wish to complain about issues at work which UNISON cannot resolve because it is either best dealt with by collective negotiation or because it does not amount to an infringement of the member's rights.

1.2.8 A grievance may arise from the conduct of another employee. The employer has a legal duty to provide a safe working environment and to ensure that employees are free from discrimination, harassment or victimisation. These types of grievance should not be treated simply as a complaint against another employee. UNISON's job is to ensure that the employer is protecting the rights of the individual against discrimination, harassment or victimisation.

This guide gives advice on how to deal with these complaints in Section 8.

### 1.3 Disciplinary

1.3.1 **A disciplinary procedure** is used when the employer believes an employee's conduct or behaviour is unacceptable and in breach of its disciplinary code.

1.3.2 Employers are required to have a written disciplinary procedure. ACAS (the Advisory, Conciliation & Arbitration Service) produce a code that is legally recognised.

1.3.3 In employment where UNISON is a recognised trades union, there will almost certainly be an agreed disciplinary procedure. An acceptable procedure is one that is fair and follows the principles of natural justice and requirements of the Employment Act 2008. Specifically:

- an investigation
- the right to be notified in writing if the hearing could result in dismissal
- the right of the employee to receive in

writing, before a hearing, an explanation of what they are accused of and any evidence to support the allegation

- a hearing free from bias by a manager who did not investigate the complaint, held in a place and at a time that is reasonable and that provides access for anyone who is disabled
- the right of the employee to explain her or his case, and the right to call witnesses if appropriate
- the right of the employee to be accompanied by an accredited representative.
- an appeal stage

*Note.* If any of the above provisions have not been met, the representative should seek advice from your branch secretary or regional organiser on whether an application should be made to the employment tribunal.

1.3.4 The job of the UNISON representative in disciplinary matters is varied. It can involve some or all of the following:

- *Reassuring the member.* Members who face the disciplinary process are likely to suffer distress. Calmness, and the reassurance that someone can advise and support them is vital. At the beginning, before the facts are all known, when no commitment or guarantees of the outcome or unrealistic undertakings should be given, a good representative will raise hope – not expectations.
- *Completing the UNISON caseform.* Helping the member to complete the form if the member has not already done so and confirming that the member is up to date with UNISON subscriptions at the correct rate.
- *Informing the member.* Explain the disciplinary procedure to the member – the different stages, the timescales, how the hearing is conducted. Providing information will lessen the member's anxiety and give confidence in your abilities.
- *Support at investigation.* Accompanying the member at meetings with the investigating

officer has a number of benefits:

- the member feels reassured and supported
- the investigation can be monitored to ensure it is conducted fairly
- the member can be encouraged to keep to the facts and not led into conjecture
- the line of questioning will give a useful indication of the possible case against the member
- the representative will be able to take notes of the questioning and answers, to help agree a record of the meeting or to dispute an incorrect account by the investigator.

■ *Carrying out your own investigation.*

Whether it is your member's grievance or a disciplinary allegation, you will need to collate evidence. Are there witnesses helpful to your member? Are there documents or records that you need to see. How can the member prove her/his claim or counter the evidence the employer is putting forward? You must ensure the member provides copies of any relevant information s/he may have to help the case.

■ *Advising the member.* Once the charges and facts are clearer, advising your member of the possible outcomes and on how to plead.

■ *Representation.* Supporting your member in the hearing on a basis agreed with your member beforehand.

■ *Protecting the member's legal rights.*

Alert your regional office (or ask your branch secretary to do this) immediately if your member is dismissed. In some cases it may be possible to pursue the case through the Employment Tribunals [see box after section 2.6.1]. A claim must be lodged with the Employment Tribunal within three months less one day from the last day of employment. This can only be done by UNISON's solicitors, so you need to act promptly to refer the case form to the region.

*You must not wait for the employer's procedures to be completed before asking*

*the Region to lodge an Employment Tribunal claim. This may mean that some cases will be lodged before the employer level procedures have been exhausted (in this case, an appeal heard). This is because a members only has 3 months less one day from the 'trigger' event (e.g. act of discrimination, less favourable treatment, dismissal etc) to lodge a claim at an employment tribunal.*

*More guidance on each of these tasks is given in Section 2.*

1.3.5 Certain occupations are governed by a registration body that can take disciplinary action separate from the employer. See Section 12.4.

## **1.4 If the member chooses to reject UNISON advice**

Having discussed the case with you, a member may reject your advice and decide to pursue a separate course of action independently, or seek help elsewhere. That is their right but in these circumstances, the member should be advised of the relevant time limits to lodge a claim with the Employment Tribunal, that you were prepared to act for them, that any legal costs will be at the member's own expense and that their independent action forfeits any further right to UNISON support in respect of this matter.

*A model letter is given at Appendix C*

## **1.5 If the member is denied representation**

This will be an exceptional step. It is for the member to decide how to proceed with the member's own case. However, if UNISON is to provide representation, then this must be on a basis agreed between the member and representative. If a member will not accept or cooperate with advice given according to this guide, then, subject to the authority of the branch, representation may be withdrawn.

*More information and guidance on this is given in Section 4.2.*

## 2. General principles governing advice and representation

**This section examines how we should give advice to a member on issues of grievance or discipline, what we mean by representation and how to present a case.**

When a member comes to you for help there are some simple, clear steps:

- find a quiet place where you won't be interrupted to sit down and put your member at ease
- **listen**
- ask questions and ask to see any documents, letters, names of witnesses and any other evidence that may seem relevant.
- make a note of the key facts
- advise the member
  - how to proceed
  - what you will do next
  - what the member must do
- ensure your member agrees with the course of action and agrees what you hope to achieve based upon your assessment of the available evidence and information.
- While it is fresh in your mind, make a record of the advice you have given to the member, date it, and file it under the member's name for

future reference.

### 2.1. The UNISON caseform

2.1.1 Before we can give formal advice or assistance to a member on a grievance or disciplinary matter a UNISON caseform must be completed.

2.1.2 The UNISON caseform provides a means to:

- ensure we have all the key facts and information we will need at the outset
  - monitor our casework and the kind of cases being raised by our members
  - look for problem areas – particular employers, departments or managers where there appear to be a concentration of problems which we may need to address separately; or where there are particular issues that keep coming up and which may point to an organising, campaigning or bargaining issue
  - refer a case to a more experienced representative (eg, first a branch secretary or senior steward, then to the regional office for a member of the organising team) systematically and efficiently without causing concern to the member
  - ensure the member understands the obligations on him/her when we give assistance. Remind the member of the need to be proactive and provide you with all the relevant information to make out their case
- 2.1.3 The UNISON caseform may already have been completed by the member prior to

your meeting, but if not then you can complete it with the member at the “Make a note” stage (see 2.4 INTERVIEWING THE MEMBER).

2.1.4 Going through the UNISON caseform together with your member can:

- be helpful to you
- put your member at ease
- show that you are being efficient
- provide you with clarity about the facts
- encourage the member to think realistically about what can be done
- provide a discreet way of confirming that the colleague seeking your help is in fact a UNISON member
- ensure that you have all the key facts and information at the outset

**The UNISON caseform gets its name from the CASE system operated at all UNISON regional offices and head office. CASE is a computerised tool for managing and monitoring cases referred to the regional office. It can ensure that cases are dealt with in the correct manner, that both the member and yourself remain aware of what is happening and that we can learn from our casework experience. Supplies of the UNISON caseform are available from your branch or from Communications – stock number 2285 – or can be downloaded from [www.unison.org.uk](http://www.unison.org.uk). If you are seeking to refer the case to another UNISON representative you MUST enclose the completed UNISON caseform. UNISON is committed to quality public services. To deliver those services, members should receive the training, support and supervision necessary to do their jobs well – we cannot condone dishonesty or malpractice.**

**UNISON’s commitment to equality is enshrined in our core aims & objectives, which means that we will not condone any act of discrimination, harassment, victimisation or bullying whether the victim is a UNISON member or not.**

- ensure that what action has been taken by the member, or on the member’s behalf, is recorded if the case needs to be passed on to another UNISON representative.

## **2.2 About your job as UNISON representative**

### **2.2.1 Creating fairness**

Being faced with a grievance you don’t know how to resolve or allegations and accusations you don’t know how to answer can be distressing for any employee. Facing up to managers at a formal hearing, with all the power and resources they control, can often force employees to “give in”. That’s where you come in! You can’t “make it all go away” but you can ensure fairness by making sure the manager sticks to procedures, that all evidence helpful to your member is obtained and presented, and by being there to give support to your member.

### **2.2.2 Winning at all costs?**

In a disciplinary procedure, what it is not your job to do is to “get the member off” irrespective of the evidence.

You must not lie for the member. You can only present the best case possible based upon the facts of the case.

Sometimes you may be asked for help by a member accused of something you personally find repugnant and you may believe the allegations true. This guidance is designed to help you deal with such situations, to ensure you are not asked to defend the indefensible. No UNISON representative likes dealing with

such cases. It is part of our responsibility once we accept UNISON office – so it isn't fair to refuse to deal with a case on moral grounds and pass it on to someone else.

If you follow the guidance in this book then you will ensure that a member who commits some appalling offence is not able to hide behind UNISON but receives only the appropriate advice and assistance to which the member is entitled. [see Sections 4 and 8]

### **2.2.3 Standards of behaviour**

Remember, you are playing a very important role on behalf of UNISON. Your actions will not only impact on the outcome of your member's case, but will also reflect upon the reputation and credibility of UNISON – your branch, the national union, and yourself.

UNISON expects all members to treat one another with dignity and respect. So, whether addressing your member or the manager – be polite, but forceful when necessary. Don't lose your patience, and remember, being abusive is unlikely to assist your member's cause.

You should also expect to be treated with respect by others. If your member is abusive towards you, then seek help and advice. If it is the manager, then make a record of what was said so it can be taken up later.

### **2.2.4 If you are on a professional register**

Some members and their representatives are required to be members of professional bodies and abide by their standards of conduct which may include a requirement to report the actions of another registrant that may constitute a risk to others. If, following a disciplinary hearing where your member has successfully denied allegations, you learn that you have been misled, your professional body may expect you to report the matter. If you feel compromised about what you should do, first take advice from your regional organiser.

### **2.2.5 Need help?**

If you are not sure how best to proceed, **ask for help**. Far from undermining confidence in you, your member will appreciate that you have back-up when you need it.

The UNISON workplace representative [steward or safety representative] is usually the first port of call for members and if members first enquire elsewhere and need assistance, they will usually be referred back to you, their elected representative.

You can get help from another steward, your branch secretary or a special branch officer. UNISONdirect on 0845 355 0845 can provide a range of information, including booklets and factsheets that can help you to advise your member or prepare your arguments. [There's more about support in Sections 5 and 14].

If you are really uncertain about proceeding yourself, using the UNISON caseform you can refer the case to a more experienced representative. In more complex cases your branch secretary can use the UNISON caseform to ask for assistance from the regional organising team. In all cases you should remain involved to support your member.

Advising and representing members can sometimes be distressing and stressful for the representative, who may feel a heavy burden of responsibility. It is important that UNISON representatives remember they are not alone; discussing a case with another, more experienced representative, taking advice or seeking reassurance can be informative and encouraging. Representatives are encouraged to discuss confidentially their casework with a senior branch officer.

## **2.3 Management investigations**

Sometimes the first approach you receive from a member is when s/he has been asked

to attend an investigation that could lead to disciplinary action.

- Follow the guidance in this section.
- Ensure your member is told what the allegations are, and if written allegations are being investigated, that your member sees them before taking part in any interview.
- Reassure your member about the confidentiality of your position.
- Ask your member about the allegations.
- Encourage your member to tell you everything so that you can discuss the strengths and weaknesses of the case and advise the member how to proceed.
- Remember, if you accompany a member to an investigation hearing, it is for your member to answer the questions, not you. And your advice to your member must be to be as truthful as possible and not to tell an outright lie that might later be discovered and undermine the relationship with the employer.
- Be very cautious about a manager who wants to talk to you outside of the formal procedure. Listen, but do not disclose your hand. Remember and make clear that your obligations are to your member.

## 2.4 Interviewing the member

### In brief:

- **ensure your member feels comfortable to talk to you**
- **listen to all your member's concerns**
- **check out the procedure the issue falls under**
- **make sure all legal time limits are covered**
- **investigate the facts, any witnesses, good practice, rules, codes of practice or conduct, employer policies and past practices**
- **make two lists – one of all the facts that**

**are helpful to your case and one of all the facts that are unhelpful**

- **Consider what help the member can be to you in getting information**
- **Check for collective issues [see Sect. 3]**
- **advise your member on what you think may be possible and about any legal rights. Ask your regional officer if you don't know what these are**
- **equally, be realistic, don't raise expectations, and advise your member if you think the employer might be right**
- **reach an agreement with your member on how you will proceed**
- **keep your member informed every step of the way**
- **get advice if you are uncertain about anything**
- **make sure the UNISON caseform is complete and signed.**

Find somewhere quiet and where you won't be interrupted to interview your member.

- Turn off your mobile phone!
- If your member is nervous or cannot express her/himself with confidence, ask your member if s/he wants a friend to attend future meetings to give emotional support (this may be a representative from an appropriate self-organised group). Make clear that this friend is to support the member and not interfere in the case, but ensure this friend is kept involved whenever the member wants this [see Section 5.2.3]. If the friend's conduct becomes a problem for you, raise the issue with both the friend and the member.
- Be aware that your member may have access needs which may affect how you use documents, how you communicate, or where you meet. If there are needs which cannot easily be addressed by you (eg. language translation, Braille) the employer should be asked to facilitate these or otherwise contact your branch secretary to ask for the support



you need.

In all cases, be patient with your member! Whether your member is so stressed that s/he wants to “unload” or has difficulty expressing her/himself, be tolerant and try to structure the meeting. Ensure that at the end of your meeting you summarise to the member what the member has told you.

Be **realistic** about the situation and what you can do. Your strategy will need to be agreed with the member.

Obtain all the evidence you can from the member including details of any witnesses to the events, or witnesses to your member’s good character who might be helpful. If raising a grievance, ensure that the grievance is put in writing to the appropriate manager and a copy kept for your records. And in **disciplinary cases**, make sure the manager has provided you with all their evidence before the hearing – they are obliged to put in writing the reasons for their concerns and to provide details of all evidence.

**Discuss** all of the evidence with your member. What has your member asked for? What does the evidence tell you about your chances of achieving the outcome your member hopes for?

Be careful not to raise your member’s expectations too highly – of course you want to do the best but you don’t want the member blaming you if you don’t get the result you wanted. You can put a brilliant case but still lose!

If the facts and evidence seem stacked against your member – be cautious. Give your member the opportunity to reconsider:

- should you proceed?
- in a disciplinary case, should you accept the evidence and concentrate on any mitigation (valid reasons for the actions of your member)? While it is for the employer to prove their case,

it may be better for the member to admit the accusations from the outset, say sorry, and explain how s/he can prevent a future reoccurrence.

If you think the member’s case is really un-winnable, then say so and explain why. Fighting a hopeless case might leave your member worse off, wastes your time and can undermine your credibility with both managers and other members.

Review with your member what you hope to achieve and ensure you reach an **agreed position**.

**The UNISON representative needs to be respected by members and by management. You need to have the reputation of being a good representative and that you have a case worth listening to.**

## 2.5 Preparing for a hearing

When you have collected your evidence, you need to decide what you will use and how to present it. Preparation before the hearing is very much the key to successful representation.

You need to decide what you will say and what your member and any witnesses will say.

Oral evidence given by your member will often have greater impact than anything you will say.

Note: You may hear a distinction made between “full representation” and “technical representation” – sometimes looked upon as an excuse for representing a member who has done something we cannot defend. This distinction is unhelpful. Following the guidance in this book will ensure that the case is presented in the most appropriate manner, based on an agreed strategy.

**Remember, this is your member’s case. Don’t just take over – it may alienate your member. Your emphasis should be on “empowering” your member.**

**The degree to which you might speak or act for your member will vary from case to case.**

**Your member may be confident enough to present the case if you are there for moral support and guidance. In other cases you may be needed to present the case and speak on behalf of the member.**

**Before the hearing you must reach an agreement with your member about what you, and what the member, will do or say in the hearing.**

Make a list of all the points of evidence in your member's favour and make a list of all the evidence that you think is unhelpful. Decide how you will draw attention to the good evidence. And decide how you will respond if the unhelpful evidence is raised.

Explain how you will proceed to your member and the witnesses:

- tell them the questions you will put to them
- listen to the answers they intend to give
- but don't put words into their mouths – they will be unconvincing!
- remind the member to stay calm.

Be cautious about over "rehearsing" your witnesses; their evidence might sound stilted or worse, untruthful.

When planning your approach for questioning witnesses from either side, it's a good idea to list the points of evidence you want to hear and make up your questions as you go along, rather than go ahead with a list of questions.

## **2.6 Presenting the case**

Whether it is you, the UNISON representative, who will be presenting the case to management panel (or manager) or whether you have agreed that your member will be doing most of the talking, the following simple rules will help:

■ *Make sure you are familiar with the formal procedure* (eg grievance procedure, disciplinary procedure, harassment procedure).

■ *Be clear about the procedure to be followed at the hearing. What is the order of speaking?* When will you have the opportunity to present any mitigation (a good procedure would only invite you to present mitigation after a decision has been made on the facts of the case, but some employers may expect you to offer any mitigation during your summing up).

■ *Be sure of the facts of the case* – list those which are in your member's favour, and any which are not.

■ *Be clear about the "rules" relevant to the case* – Conditions of Service, relevant local policies and agreements, precedent (how management have dealt with similar situations in the past). There could also be legal implications upon which you might need some advice (see Sections 12 and 14).

■ *Always speak clearly, and politely.* Don't "attack" or interrupt the officer presenting the case against you, or any of the opposing witnesses – even if you know they are lying. If you lose your temper it could lose any sympathy for your member's case. You will have your chance to question the opposing witnesses – this is called "cross-examination".

■ *Try to make your points clearly and concisely.* It's better to speak in short sentences, and to summarise the key points you made at the end of any lengthy "speech". If your witness seems "long-winded" or to never get to the point, ask a further question to confirm the point you were seeking.

**Types of questions you might use.**

**Open questions** – these are the "who, where, when, what and why?" questions.

**They are best used for your witnesses whom you have "rehearsed". Open questions are the "Tell me about.....?" style of question. They give your**



**witnesses the chance to say, in their own words, what you hope to hear. It creates a better impression when the witness comes straight out with that crucial piece of evidence (but if they don't, then move on, otherwise you will only highlight the problem and may appear to be bullying). Closed questions – these are questions that require a “yes/no” answer. They are usually the best questions for witnesses when you are not sure what they will say, or to avoid them saying something you don't want them to – probably management witnesses. Leading questions – a little like closed questions. They are the “Would you say ...?” style of question and are best avoided.**

■ *Try to appear confident without being over-secure or big-headed.* Again, that might work against the interests of your member. Don't worry if you're not acting like a barrister – and don't try to!

■ *If you need an adjournment, ask for one.* If your member becomes upset or agitated – take a break. Or if something comes up in the hearing you weren't expecting and are not prepared for, ask for a short break. It is important that you clarify any new information with your member as soon as possible rather than ignore the problem. You should be constantly evaluating the case, so be prepared to use an adjournment to reappraise the case with your member. If new evidence creates a real problem for you and you can't agree with your member how to continue, you might need to ask for a longer adjournment so that you can take advice yourself, and if necessary refer a fundamental disagreement to the branch representation committee (see Section 4.2).

■ *If your member is presenting the case,* keep a record of what is said and pass a note of any important point that your member may have

missed. Similarly, if you are presenting the case, give your member a notepad to make a note of the proceedings. These notes will be useful for cross-examination or for your summing up at the end, and will also ensure your member is fully involved.

### **New facts and evidence**

**If in the course of a hearing new evidence causes you a problem, don't just “plough on” – ask for an adjournment and discuss the new facts with your member. If necessary, consider whether an admission with some mitigation might be better than losing – it may be the difference between dismissal and a final warning.**

**Remember, your job is not to defend the**

### **Witness Statements**

**Most grievance and low level disciplinary hearings are relatively informal without the need for formal statements, and witnesses can simply be brought forward to speak on behalf of your member. However, in stages where you may need to submit a written statement of case to the employer before the hearing – either to explain the grievance or respond to disciplinary allegations – you may also need to prepare a witness statement for each of your witnesses and your member.**

**The advantages of a witness statement are that:**

- **a clear and unequivocal statement can be made**
- **you know what the witness will say and nothing will be forgotten;**
- **the witness will be less intimidated having already written down what s/he has to say**
- **it adds weight to your statement of case that independent witnesses support what you are saying**

**In most cases, rather than ask the witness to write down what they have to say, it is better if you listen to what they have to say and then draft the witness statement for them to approve, amend, and sign. That way you can ensure the witness statement concentrates on the important facts only. But be careful not to put words into your witness' mouth; don't exaggerate the witness's evidence otherwise it will not appear convincing when read out aloud by your witness and may be further undermined under cross-examination.**

**indefensible. Your member has agreed to cooperate and in Section 4 we discuss what to do if your member refuses to accept your advice.**

### **2.6.1 The final words**

■ *At the end of the hearing*, you should have the opportunity to sum up the case. Just stick to the key facts that have been established and any important evidence. Don't try to repeat the whole of your case. Emphasise the helpful points but stay off the weaker ones.

■ *When you receive the decision*, if it is not what you were hoping for, don't argue. If the decision goes against you in a disciplinary hearing, it's a good idea to ask for a short

adjournment whilst you discuss the outcome with your member. If your member now accepts the verdict, you might then be able to discuss with the manager any mitigating circumstances which could be taken into consideration when determining disciplinary action – that is any reason why your member acted as s/he did and which might make the action or “offence” more understandable or pardonable. Even where your member does not admit error, it may be worth referring to the member's previous employment record, drawing attention to any particularly favourable contribution the employee has made to work, any praise received, attendance record, even personal circumstances, etc. Points of mitigation might reduce the level of action taken against your member.

If your member has accepted the allegations then you will want to present any mitigating factors at this stage (see next paragraph). If your member has contested the allegations, then unless you are clear that you will have the opportunity to present any mitigating factors if a decision on the facts goes against your member, you will need to include mitigation in your summing up (“Although my member denies the allegation, if you don't accept this and intend to discipline my member, can I say in mitigation that ....”)

## **Employment Tribunals**

[see also Section 12.3]

**The employment tribunal is an important court of law with a responsibility to determine specific employment-related issues. Most commonly, the employment tribunal will be asked to decide whether a dismissal was “unfair” or whether a member had suffered discrimination at work on grounds of race, sex, disability, sexual orientation, political or religious belief, age, or treated less favourably on grounds of her/his fixed term or part-time status. There are other types of complaints that an employment tribunal can hear and if you need advice on this you should refer a case to the regional office.**

**An employment tribunal can only make judgment within the limitations of the law. This means that they will not always agree with an applicant, even with UNISON support and**

even when we know the actions of the employer are morally wrong. The tribunal should therefore be seen only as a last resort after all attempts to persuade the employer have failed.

**UNISON** usually instructs solicitors to act for our members in employment tribunal cases and a claim to the employment tribunal is usually lodged by them. Otherwise only regional officers have authority to act as **UNISON** representatives in the employment tribunal, although branch representatives can remain involved.

It is therefore important that the branch representative dealing with a case alerts the regional office, using information on the case form, of any case likely not to be resolved at employer level. This is best done if the branch representative dealing with the case ensures that, in the case of grievances, the regional office is notified if a case is still progressing one month after the event that triggered the member's grievance, and in the case of disciplinary matters, immediately a member is told they will be dismissed. It is important to keep in mind that an extension of time is not granted upon the lodging of a grievance and that a claim must be lodged with an employment tribunal within three months less one day of the trigger event occurring. In the case of dismissals, the time limit to refer a case to an employment tribunal expires three months less one day from the last day of employment.

In all cases referred to the regional office, an assessment is made about whether the case may have the potential to go to the employment tribunal and if appropriate it can then be referred to **UNISON's** solicitors. Our solicitors will contact the member and advise on the strengths of the case and how we should proceed. Where the regional office is alerted to a case that is continuing locally but that may need to proceed to tribunal, the case will be recorded and an alert triggered to ensure that, if judged appropriate, the case is registered as a protective measure pending the local outcome.

If you think a member's case may be "out of time" – seek the advice of a regional organiser immediately.

There are also qualifying periods for some types of cases. In claims of "unfair dismissal" the applicant needs 12 months continuous service with that employer. In discrimination cases there is no qualifying period, which means that members are entitled to take a complaint of discrimination to an employment tribunal even if it arises from their non-appointment to a job.

Time limits for making an application to the tribunal can be complicated. It is therefore important to take advice as to the relevant time limits. Generally, as an example, a complaint of discrimination must be presented to an employment tribunal within three months less one day of the discriminatory event occurring.

As a result of changes in legislation, lodging a grievance no longer secures an extension of time to lodge the claim with an employment tribunal. You should therefore assume that in all cases an employment tribunal claim must be lodged within three months less one day from the termination of employment/trigger event occurring, and the regional office should therefore be alerted of any case that may not be resolved at employer level within a three month period.

## 2.6.2 At the conclusion of the hearing

Whether a grievance or disciplinary hearing:

- ensure the manager will confirm the decision in writing quickly

- advise your member of any **rights of appeal** within the employment. See the model letter at Appendix D. Failure to register an appeal may lead to a reduction in any compensation later awarded by an employment tribunal.

**Rights of appeal against the decision should be contained in the relevant procedure [eg. grievance, disciplinary, harassment]. Make sure that your member is aware of any time limits and whether it is you or the member who is to submit an appeal.**

- If an appeal is necessary and if it is agreed that you should submit the letter of appeal to the employer, ensure that you do so within the time limits and *keep a copy*. Equally, if the member is to lodge the appeal, ensure that the member understands that this must be in writing and is aware of the need to keep a copy of the letter

- If your member has been dismissed, or the grievance unresolved, advise your member that, in addition to any internal appeal rights, s/he may be able to lodge a claim with an employment tribunal [see below]. In the case of discrimination and grievance matters, where there is a right to take the matter to an employment tribunal, the normal deadline for doing so will also be within three months of the “incident”. If you need to take advice on this, make sure your member hears from you in writing as soon as possible. Your member should also be told that a decision about whether we can recommend and support a claim to the employment tribunal will depend upon the strength of the facts in the case and the advice of our solicitors.

- If your member asks for help and support

to make an application to the employment tribunal, you must refer the case to your regional organiser without delay. **Lay officers of UNISON are not authorised to represent members at employment tribunal hearings.** You should update and forward the UNISON caseform as quickly as possible to your branch secretary who will authorise it and refer it to the regional office. **Don't wait for the internal appeal to be concluded and as far in advance of the 3 months (less one day) deadline as possible.**

- A member who has independently made an application to the employment tribunal must be advised that UNISON may not support the application if it is assessed as not strong enough to proceed, or if the application was not properly completed.

- **Once the case has been referred to the regional office,** an application to the tribunal may be made on behalf of the member and the member informed.

- **Fitness to Practice.** Following a decision to impose a disciplinary sanction on your member, or even before, the employer (or other party – see Section 12.4) may make a complaint to the member's registration body where the profession is governed by requirement to register. It may be some time after the disciplinary process has concluded that the registration body first writes to the member to advise that they are investigating the complaint, or it may be at the time when you are still supporting your member. In either case it is important that you advise the member not to respond to any request from the registration body to provide a statement or information without first taking advice from UNISON. Registration issues are serious matters and can lead to your member being struck off and prevented from practising even where the employer locally has not decided to terminate employment. UNISON has produced a leaflet that should be given to all member s

who are covered by a registration body. The leaflet advises the member what to do should they be notified of an investigation by their registration body. The leaflet can be ordered from UNISON Communications dept, stock number 19139, or can be downloaded at <http://www.unison.org.uk/acrobat/19139.pdf>.

**2.7 Mediation** Whether you participate in mediation is a matter for individual choice after having weighed up the pro's and cons of the decision. You may like to discuss an employer's offer to participate in mediation with your regional organiser prior to making any decision.

Mediation as a concept is designed to bring the parties together to agree a mutually acceptable way to resolve the outstanding dispute. In order to be successful, mediation relies upon good faith participation by both sides. It is not arbitration and so there is no obligation on either party to accept an outcome proposed at mediation. Any outcome which is achieved must be made through agreement of both parties.

With the introduction of the Employment Act 2008, parties to a dispute are now encouraged to make greater use of mediation services both prior to the lodging of an employment tribunal claim and subsequent to the lodging a tribunal claim.

ACAS now provide a voluntary mediation service which is available free if both you and the employer wish to use it. A professional mediator will often charge for their services and you should never agree to their engagement if the employer is not willing to meet the full costs. You should also never substitute mediation for lodging an appropriate grievance or commencement of proceedings before an employment tribunal. Remember participation in a mediation process does not secure an extension of time for the filing of a complaint with an employment tribunal. You will still only

have three months (less one day) in most claims that can be lodged at ET.

Keeping these issues in mind you may want to consider in discussions with your member if mediation is right for them. For instance mediation might be appropriate for the following types of issues (provided the employer is willing to participate in good faith):

- low value claims;
- straightforward claims like many unlawful deduction from wages claims;
- claims where the member's main concern is not monetary e.g. they want an apology, an issue reopened;
- where there is an ongoing relationship between the employee and the manager who is the subject of the grievance;

Mediation is probably not appropriate in these circumstances (but again this is subject to your discussion with the member):

- complex cases. e.g. discrimination;
- cases where medicals are disputed;
- high value claims.

Whether you participate in mediation must be a decision taken after a balanced consideration of the benefits and negatives. If in doubt advice can be taken from your regional representative.

### 3. Organising around issues

**“Organising” is about building strength in the workplace. By adopting an “organising” approach to our casework, we can recruit new and more “involved” members working with them to help resolve grievances and get better working conditions for the future.**

**In this section, we look at some of the questions and issues we should consider at the start of a case – whether a grievance or a disciplinary. We also look at what we can do once the grievance or disciplinary case has been won.**

We all know that the union becomes more effective the more members we have and the more they play a part. It’s not to say that on every individual’s grievance or disciplinary issue, we should seek to involve all the members, BUT:

- Whilst one member has raised a grievance, other members or non-members may be similarly affected now or in the future; asking others what they know begins to get them involved and could help your member.
- Letting the manager know that other members support the grievance may not only resolve the one case but may also help you negotiate a new policy or procedure for the future and for other members.
- The first to be picked on for a disciplinary case may be “unlucky” but the case could raise issues which other members might be concerned about.
- Finding that an issue does affect a wider group can help you recruit new members, strengthen your steward organisation and help your members to take ownership of their issue.
- **Don’t** go telling other members about the case you are dealing with until you have agreed the way forward with your member and what you will be telling or asking them. Respect your member’s privacy! If you decide to go ahead, encourage your member to talk to colleagues.



### 3.1.1 In disciplinary cases...

Is it a one-off case or part of a trend?

■ Are there trends of other similar workers being disciplined for the same thing? This might point to poor management, that rules and procedures are vague or non-existent, that training or supervision are inadequate, that work organisation is inefficient or that expectations are unrealistic. Such weaknesses may strengthen the case you are putting forward for the member and point to your negotiating agenda for the future.

■ Are there trends of other similar workers being disciplined for **different** things? That is to say, is there evidence of discrimination – that over time more disciplinary actions seem to be directed at black workers or women [or disabled workers, lesbian, gay and bisexual workers, young workers, old workers, etc]. Such evidence will help your case and again point to there being issues to be addressed by your members and in negotiation with the manager.

### 3.1.2 In grievance cases...

Many grievances will affect others if you look closely enough.

■ A member complaining that s/he wasn't given time-off to visit the dentist when another employee was suggests the need for a more transparent and fair special-leave agreement.

■ A member complaining that s/he wasn't given access to a training course that others have been on suggests the need for the training policy to be reviewed.

■ A member complaining of bullying or harassment will seldom be the only person facing the same threat.

■ Similarly, a member with a health & safety complaint is unlikely to be the only one affected.

The list of examples goes on.

Branches that collect UNISON caseforms after the case has been concluded and monitor the issues and outcomes may be able to build up a picture of potential organising issues.

### 3.1.3 After the case

Even if you didn't involve other members before the case, there may be lessons, issues raised and the need for new procedures or policies to be negotiated. Whether you "won" or "lost", it is important that members and non-members know of the support you gave their colleague; it is also important that you inform and work with them on changes and improvements that need to be negotiated with the management.

Taking this organising approach to your role will mean that instead of simply waiting for the next grievance or disciplinary to happen, both you and your members "take a step up" – you build upon your work and success and leave a lasting improvement in place.

**Publicising your success can also help others. It might give ideas to other members and stewards in a similar situation; other stewards will be able to take pride and recruit new members based on your achievements. And your branch newsletter editor will be forever in your debt for a good story. [Again, remember to get your member's ok first before using any names.]**

**You will find more help and information on organising in the steward's handbook, in the regional education programme or on UNISON's website [www.unison.org.uk](http://www.unison.org.uk)**

## 4. Cases where we cannot provide representation

***It is a member's right to seek advice and support from UNISON when the need arises.***

***It is our responsibility to ensure that the member is given the best advice about what can be done.***

(See also section 6)

Even when we dislike what the member is said to have done; or when we feel the member's actions are repugnant to us, we still have a responsibility to advise the member on his/her rights and the best way forward. And if the member accepts our advice then we will provide appropriate support. For example in a disciplinary case, if the member accepts the criticisms or allegations then it may be enough to ensure the member is given the opportunity to offer any mitigation, where possible, or to make amends.

### **4.1 When it is not appropriate to provide representation**

However, there may be occasions when we cannot provide representation to a member. These occasions will be few and exceptional.

■ Where the issue for which the member seeks assistance occurred or first became apparent to the member before the member joined the union [see also Section 6.3]. The four week rule, and the exception to the above in the case of collective equal pay claims.

■ Where the member will not accept our advice.

■ Where the member refuses to cooperate fully with us [for example, you find that the member has not been honest and frank in telling you the facts of the case].

■ The representation being sought is outside the services provided by UNISON rule.

■ Where the member has also asked someone else to make representations to the employer. This is to avoid there being two representatives in a case, or, to avoid a member bringing a case to us when another representative has already made representations to the employer and possibly compromised any representations we might otherwise have made. It does not, however preclude a member having sought advice from a third party (whose advice may have been to ask the union to help). Further, in some limited circumstances (for example where the member has sought support from a Race Equality Council adviser) it may be legitimate for that advisor to remain involved in a supportive capacity provided it is understood that UNISON is the sole representative and the advisor is not obstructive [see *Appendix E for sample letter for use in certain situations*].

■ A member who has instructed a private solicitor to act as representative either prior to or during Employment Tribunal proceedings cannot also request the support of a Union Solicitor. However, if a member who is represented by a private solicitor requests information from UNISON to assist with



## **Note on cases involving harassment, discrimination or bullying**

**Representing members who are accused of harassment, discrimination or bullying presents particular problems to UNISON representatives. It is important that our actions are seen to be consistent with our values. We cannot condone or defend such actions, whether or not the victim is also our member. Nor can we ignore or refuse outright to hear or assist a member accused of such actions.**

**Representatives must be careful not to presume guilt and must not ignore our obligation to advise the member and ensure a fair hearing. [It is also not in our interests that a harasser might win a subsequent appeal on the grounds of some technicality arising from not being represented.] For more information, see Section 8 and also Section 2.4 on interviewing the member.**

an Employment Tribunal claim, and this information is ordinarily provided to members who are represented by the union, then this information should also be provided to the privately represented member as long as this is legally permissible and appropriate and subject to the union's obligations under data protection legislation. Always seek the Region's advice in these circumstances.

In addition:

- A member appearing as a witness [see *Section 7*].
- In a grievance hearing, a member who is the manager whose decision gave rise to the grievance [Managers cannot expect representation when they simply carry out their functions as a manager. However, managers who themselves have a grievance or face disciplinary proceedings are, of course, entitled to assistance on the same basis as any other member].
- A member named as a co-respondent in a case brought by UNISON [see below].
- Legal representation is not provided to a member for a case brought against the union or any of its officials
- Representation is not provided to a member in respect of an investigation or proceedings under UNISON's disciplinary rules where that member is the subject of an investigation or proceedings under UNISON's disciplinary rules.

And, of course, we never represent non-members [see *Section 6*].

### **4.1.2 Members named as respondents in legal cases**

Where an employee's complaint arises from the actions of another individual, it is quite possible that a legal complaint might be directed against both the employer and the

individual concerned.

This is particularly so in cases involving alleged harassment or discrimination. A complaint to the employment tribunal may well be brought against both the employer who failed to protect the complainant from discrimination or harassment, and also the alleged harasser.

Case Study: Employee A complains that her manager, employee B, bullies her and that her employer should have protected her against such actions. Sensing B's guilt, the employer seeks to distance himself from what B has done and advises him to get legal representation. Member B then approaches UNISON for help.

In fact, the employer has a duty towards B to provide support. Almost irrespective of what B may have done, the employer is responsible for the actions of all employees and also has a responsibility towards A. If B is "guilty" then the employer will be guilty also. The employer can therefore either resist the claim that B bullied A, or accept the improper conduct and seek to mitigate the employer's situation. Either way, the employer should provide the legal representation to B.

If you are approached for help in such circumstances, carefully explain the situation and advise the member to ask the employer to represent. Any refusal by the employer may give rise to a formal grievance. The employer can, however, refuse legal representation if the employee has acted "outside the scope of their employment". The member may then seek UNISON's representation. UNISON may provide support in any internal hearings, and any request for legal assistance will be referred to the Union's Solicitors for consideration on the merits.

## 4.2 Disputes over representation

Should a member dispute the representation

offered [or refused], it is proper that the member be given the right of appeal. It is recommended that a special sub-committee of the branch be called to hear and decide upon the dispute in private.

**The branch representation sub-committee** should comprise a small number of experienced members appointed on the basis of fair representation and proportionality. It should not include anyone with previous involvement in the case. It should conduct its business according to the normal rules for formal hearings, giving both the member and the responsible branch officer [steward] the opportunity to state their point of view. All participants must be assured of confidentiality.

**Speed.** It is vital that the whole process of setting up and convening the sub-committee, and it reaching its decision, is carried out speedily so as to avoid prejudicing the member's disciplinary hearing.

**Caution.** The purpose of the branch sub-committee is not to hear or judge the principal case – only to decide whether and how a member might be represented. This will be determined on a consideration of:

- what the member says
- evidence from the branch officer about why representation should be refused or withdrawn.
- UNISON rule
- a "prima facie" assessment of the case – a summary of the facts available.

The sub-committee should assess the relevant evidence available from what the member says, what is in the management statement of case against the member and the representative's assessment of the case or the member's conduct, as appropriate. Witnesses should not be involved directly.

In cases where one member is accused of action against another (eg harassment,

discrimination, bullying, victimisation), the two members should not be asked to argue their respective cases. It is not the job of the sub-committee to choose between two members.

#### **4.2.1 Decision of the branch sub-committee**

The decision should be promptly discussed with the member and **confirmed in writing.**

If the decision is to withdraw support and representation, then a model letter is shown at Appendix A.

Note the model letter advises the member of any procedural or legal rights – this is important to protect UNISON's position.

If the decision is to represent the member then the sub-committee must determine whether this should be the existing representative or a new representative from within the branch. A decision to provide representation might be qualified by some condition on the member's future conduct which might lead to withdrawal of support, or a reminder that UNISON's representative cannot offer any defence or justification for actions amounting to harassment or discrimination.

#### **4.2.2 A further appeal to region**

A member can appeal further to a lay committee of the relevant region. The member should be advised that s/he may appeal against the branch's decision by writing, within 10 working days, to the regional secretary or delegated officer.

The terms of reference of the regional appeals committee will be to decide whether or not the branch has reached its decision according to these guidelines.

On receipt of a notice of appeal, the regional secretary will provide a copy to the branch secretary and seek a written report to be provided within 15 working days. If the

complaint appears to have a sound basis then the regional secretary (or delegated officer) will convene a panel of members drawn from the regional committee or relevant service group committee, to which both the member and branch secretary will be invited to attend.

If it is decided that the branch has not acted according to these guidelines then either the branch will be asked to reconsider the member's request or the committee will decide the matter itself.

If the branch has followed the guidelines then it is not the role of the regional appeals committee to review the decision made by the branch.

If the appeals committee decides that representation should be provided then the implications of that decision will be discussed with the branch secretary and appropriate advice given. Future representation remains the responsibility of the branch. It is not for the appeals committee, or any of its members, or for any UNISON officer from outside the branch to provide representation unless the position of the member has been so seriously prejudiced as to make assistance from a branch officer unfair or unreasonable.

## 5. The appropriate representative

**In UNISON we try to be sensitive to members' emotional needs as well as their need for representation. For example a woman member may welcome the support of another woman, particularly if her complaint involves harassment or unequal treatment; similarly a black member might welcome the support of another black member.**

**The issue of meeting both of these needs often creates difficulty for UNISON representatives. This section advises how we can give both emotional or moral support to the member, whilst ensuring that representation is provided in an orderly and democratic way with the final decision on representation resting with the branch.**

The key representative for a member is the directly elected workplace steward. Whether the member first contacts the branch office or UNISONdirect, the case will first be referred to the local representative. To do otherwise can undermine or compromise the steward in the eyes of fellow members or the management.

### 5.1 Representation as a partnership

If you are inexperienced in representation, or need advice, then help is on hand from a more experienced representative or a member of the

regional organising team. Specialist advice is available from specialist officers – such as the branch equalities officer, health & safety officer or conditions of service officer, depending on the nature of the problem. And additional support can be given by stewards helping each other – such as a black steward providing that extra support to the black member whose steward is white.

Experienced or senior representatives asked for their help are encouraged to work with, or mentor, inexperienced representatives to build up their confidence and experience.

Whilst stewards are encouraged to attend training on representation skills and to build up experience, it is important to know your limitations. When advice isn't enough, you might want to ask a more experienced or senior representative to work with you on the case – with the agreement of your member.

**When referring a case to another representative, you MUST complete or update the UNISON caseform. Forward all the information you have and what you have done. Don't simply ask the member to contact the new representative directly.**

### 5.2 Let's look at some issues...

5.2.1 Member contacts someone different from the "line" rep.

Our aim is that every member should have an elected representative at the workplace. So it's reasonable for us to expect that the member should contact the workplace steward first of all. And it's important that other stewards

respect this if someone who isn't your member contacts you, otherwise you will undermine your colleague and overburden yourself.

Of course the member may have genuine reasons – contacting you because of your excellent reputation in representing members; contacting the branch secretary or regional office because the member views their case as too complicated for the steward, or because the member has a problem with the steward. In all these cases, we must act in a manner sensitive to the member's needs but in a manner that is consistent with our democratic structures and avoids confusion. You should contact the "line" rep to agree a way forward, unless the member raised the matter with you in confidence and has an issue of some sensitivity with the steward that you feel may need to be addressed with caution. In all circumstances you should avoid acting in a way that will compromise the appropriate steward or deny the inexperienced steward the opportunity to gain experience. If lack of confidence was the reason given by the member, then discuss with the steward how you can advise and assist the steward to handle the case.

### **5.2.2 Member wants a "senior" rep.**

Every member's case is important – especially to the member. It is important that all representatives work together to convey and to provide a "professional" approach.

The member may insist that the case is handled by the branch secretary or regional organiser, or even a solicitor. For the reasons outlined above, that's not how we do it and we expect senior representatives, if approached direct by the member to respond as outlined in 5.2.1. Once the facts of the case have been discussed and a way forward identified, it is for the appropriate representative to decide whether further advice or assistance is needed to ensure the member gets the best service

from UNISON. However, if your member needs reassurance, it may be a good idea for you to check your assessment with a more experienced representative.

### **5.2.3 Member wants a representative s/he identifies with.**

For example, a black member may ask for a representative who is also black or a woman might prefer a woman to represent her. The reasons are understandable and we will want to be supportive. However, unless there is some reason to believe that the member's own rep is unsuitable [and that would raise questions!], simply passing the case to another steward who is black or a woman is not the right answer.

It's not the role of any steward to pick up cases when another steward isn't thought to be sympathetic enough. UNISON is trying to increase the diversity of its representatives.

What we can do, however, is to ask another member – maybe the branch equalities officer, a representative from a self-organised group within the branch or another willing member (who may then become more active) – to work with the steward and member and to remain involved throughout the process. **But all involved must be clear that there is just one representative acting for the member – the steward.**

Branch negotiators might want to check that Facility Time Agreements and/or the Grievance and Disciplinary Procedures make provision for this support to be given when needed.

### **5.2.4 Private advisors or representatives**

See section 4.1"

## 6. Representing non-members

- If you'll help me I'll join
  - I'll join if you win my case for me
  - All my colleagues will join if you take on my case
- The answer is “No Never”.

### 6.1 Principles

UNISON membership is something to be proud of. It is something which many members pay for without ever needing to call for help. So why should they pay if we are prepared to give away our services for nothing or a promise?

We can't afford to recruit members on the basis of some threat or qualification – supposing you spend hours of your time and don't get the result you and the non-member were hoping for? In any case, such people are unlikely to become loyal members and just as likely to withdraw their membership once they have got what they wanted and you have wasted your time.

Even when taking on a case looks like the opportunity to break into a new area of membership – the answer still must be “no”. Grievances and collective bargaining are won through being organised, by the members concerned taking ownership of their own grievances. If faced with this opportunity you should explain that by joining UNISON the workforce will show the employer they mean business, and that we can then work with

them to sort out the issues.

So the answer to a non-member wanting help is “You're too late this time. If you'd been a member we could have worked on sorting out the problem, but join today and then next time ...”

### 6.2 Collective issues

It is easier to persuade an employer if you are clearly speaking on behalf of all employees – Unity is Strength! And when won, collective grievances benefit all employees.

So, once you and your members decide to raise a grievance or mount a campaign, then the recruitment of any remaining non-members becomes a priority.

Alternatively, you may need to advise that a collective grievance cannot be pursued until we increase our membership density. In that case it will be you and our members who are saying “Join us, and then we'll take on the case.”

[see also Section 3 Organising around issues]

### 6.3 The four week rule

UNISON rule requires a member to have four weeks of membership (or not to be in more than four weeks arrears of contributions) before becoming entitled to receive free legal support and certain benefits.

This is in part to prevent someone only joining the union when they fall into difficulty. Remember what we say in 6.1, we don't represent on issues that pre-date someone joining. The National Executive Committee has

the power to waive this rule in certain cases and has done so to allow new members to join in collective equal pay claims being run at the time of joining. No-one other than the NEC can waive this rule.

In the case of someone who suffers an accident or untoward incident within the first 4 weeks of employment and *has already joined the union*, an appropriate application form for legal assistance should be completed and discretion sought from the NEC via your regional secretary.

Further guidance on the operation of the four week rule is contained in the Code of Good Branch Practice”.

## 7. UNISON members as management witnesses

**All members should be treated with respect – even when they are on “the other side” – presenting the case against you or appearing as a witness for the management side.**

### 7.1 Giving reassurance

It can be a worrying prospect for a UNISON member to face the cross-examination from the member’s own representative or any representative from the member’s own union.

UNISON believes that employees should have the right to give evidence without undue duress. Even where the testimony may not be helpful to you:

- don’t make the witness feel intimidated
- don’t make the member feel disloyal.

For you to offer some reassurance to that member:

- is good practice
- will win you respect
- may actually help your member’s case.

It is not a good idea to do anything that might lead you to being accused of seeking to interfere with management witnesses.

However, if one or more have approached you because they feel compromised or distressed, you may consider sending to them the model letter shown in Appendix B.

Remember, it is in UNISON’s interest that proceedings are seen to be fair.

### 7.2 Providing representation

#### 7.2.1 We don’t.

A management witness may ask for a representative to be with them at a hearing. Whether or not UNISON is presenting the case against the management, such requests

should be treated with caution and normally refused. It is management’s job to reassure their witnesses.

Providing a UNISON representative for a management witness can be compromising. It could be seen as a conflict of interest by the member facing the management action. But we can’t determine whether or not to provide representation on the basis of whether or not the employee facing a hearing is a UNISON member or not.

#### 7.2.2 However...

There may be exceptional circumstances. For example, a witness may be directly implicated in the issue and might want a witness to observe and record the proceedings in the event of future action against the witness; s/he may want to be advised of any question that might compromise the witness’s own position.

There may be occasions where the witness might experience particular distress or fear reprisal, for example in a harassment or bullying case.

**In all cases** the question arises of what support and reassurance the management is giving its witness and how our position is being explained to the member. Unless there are particular factors such as described above then the request should be refused

*Note:* No one can speak for a witness. A witness must at all times speak on her/his own behalf. Otherwise the value of the witness evidence is undermined and a hearing could degenerate into an argument between union representatives – one for the witness and one for the employee whose hearing it is.



### **7.3 UNISON Representatives as management witnesses**

In cases where a member has chosen to pursue a case without UNISON support it is not uncommon for the employer to attempt to exploit the fact that a member is unrepresented by calling our staff and/or lay representatives to give evidence at the employment tribunal in the hope that we can assist in their defence.

Under no circumstances should a UNISON staff member or lay representative ever agree in a member v employer case voluntarily to give evidence at the request of an employer. The only manner in which a UNISON official might end up in this position is if an employer applies for, and gets, a witness order compelling attendance at an employment tribunal. Requests should generally be refused and nothing more said. It is for an employer to take its own steps and not for us to engage in any conversation about what those might be.

There are occasions where a UNISON representative is named in proceedings. Obviously people are entitled to defend themselves in such circumstances but these cases should continue to be referred to the regional office for advice to be sought from the legal department about the way forward.

This position, will, if rigidly adhered to, help to safeguard us from accusations of discrimination and so on by members against us.

## 8. Representation in discrimination, harassment or bullying cases

**UNISON takes discrimination, harassment and bullying very seriously. They can be the greatest miseries in the workplace, yet sometimes passed off as the subject's fault or over-sensitivity. They can take many different forms and be described in different ways – harassment, discrimination, victimisation, bullying.**

**If a member complains of discrimination, bullying or harassment to you, then whatever your first impressions, you must treat the complaint seriously and your member with respect.**

**In all cases where a member believes s/he has been the subject of race discrimination, you must ask the member to complete a case form and forward it immediately to the regional office so that a legal assessment can be made, by UNISON's solicitors and an Employment Tribunal application lodged if appropriate. UNISON recognises that any action against another individual, whether a colleague or not, and which the subject finds unwelcome or upsetting is unacceptable and is likely to be deemed harassment.**

[See Race Discrimination Claims Protocol - <http://www.unison.org.uk/acrobat/RaceDiscriminationClaimsProtocol.pdf>]

While taking immediate action to ensure any potential claim of race discrimination is immediately referred to the region for a legal assessment, this section will help you with two important areas when dealing with discrimination, harassment or bullying:

- supporting the member with a complaint of discrimination, harassment or bullying
- responding where a member accused of harassment, bullying or discrimination seeks UNISON assistance.

Branches can also help members by making known our intolerance of all kinds of discrimination, either inside or outside the workplace. A suitable statement could be contained in the Branch Members' Guide, assuring members of a sensitive and supportive response if they need our help. Members who witness discriminatory actions should be encouraged to intervene to stop it.

Discrimination, bullying and harassment are likely to be about power. They might arise from the management relationship or because one person is physically stronger than the other, or from prejudice. It might continue because the employer is believed unlikely to deal with discrimination or because work colleagues tolerate such behaviour.

### 8.1 How do we recognise discrimination, harassment and bullying?

*Discrimination.* Any treatment of someone, by an employer, manager, fellow worker or member of the public, that appears to be

### **Racism@Work Information Line**

UNISON provides a service to any member who asks for support to deal with racism at work. By phoning 0845 355 0845 the member will be given basic information and encouraged to seek support within the branch. At the same time, the member's regional organiser will be alerted to the case and asked to ensure that appropriate support is given to the member.

It is therefore helpful that you should be aware that if you receive a request routed through the Racism@Work Information Line, you should:

- **note that there may be some sensitive reason why the member has contacted the Racism@Work Information Line for advice rather than contact you direct**
- **contact the member and discuss what can be done as quickly as possible**
- **seek advice from your regional organiser, via your branch secretary, on how to proceed.**

different from how others are treated and leaves that person disadvantaged (whether materially or emotionally) should be seen as discrimination. A lawyer would describe discrimination as "less favourable treatment" on grounds covered by specific legislation. It is unlawful to discriminate against someone on grounds of their race, sex, sexual orientation, disability, age, part-time or fixed-term status, religion or belief. It is also unlawful to discriminate against someone because of their trades union membership – this is dealt with separately in Section 11.

**Because of concerns that potential race discrimination claims are not being progressed to employment tribunal stage when the member's claim has failed at**

**employer level, the following precautions must be taken by all local representatives:**

- **where a member believes that they have been the subject of race discrimination in their workplace, the member must be asked to complete a Case Form**
- **all case forms setting out allegations of race discrimination must be forwarded by the branch secretary to the regional office promptly and without delay**
- **regions will take advice on each case from UNISON' solicitors from a view on whether or not the case has reasonable prospects of success at an employment tribunal**
- **in any case where the region believes the case has good prospects or is still unsure about the merits of a claim, the case papers will be forwarded to UNISON's solicitors for their attention.**

Discrimination can take many forms – derogatory remarks, exclusion from opportunities given to others, being made to do tasks that others are not asked to do, etc. Harassment may also be a form of unlawful discrimination.

*Harassment.* Unwanted conduct affecting the dignity of people in the workplace is harassment. It might relate to any of the

### **Representing and supporting members with mental health issues**

People with mental health issues experience some of the most severe disability discrimination in the workplace. The TUC has produced some comprehensive guidance to help union activists to support members with mental health issues and tackle discrimination in the workplace.

The TUC guide "Representing and supporting members with mental health problems at work" is available at <http://www.tuc.org.uk/extras/mentalhealth.pdf>

personal characteristics referred to in the box above. The key thing is that actions or comments that are viewed as demeaning and unacceptable to the recipient should be regarded as unlawful harassment.

*Bullying.* Bullying can be characterised as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.

Harassment or bullying can take many forms – spreading malicious rumours, making physical threats, making unwanted sexual advances, ridiculing someone, exclusion or making constant criticism.

Remember that much discrimination, harassment or bullying takes place without witnesses. When the member comes to you, it may be because of “the last straw” so you will need to supportively encourage the member to tell you if there have been previous incidences.

## **8.2 Representing a member with a complaint of discrimination**

It is important that you treat seriously and respect the view of a member who believes their treatment is discriminatory. Equally, you might ask a member who comes to you with a grievance whether the member feels the reason is discrimination, but it is not for a representative to decide.

Note that discrimination may be a complaint in addition to the original grievance, for example: “I have been refused a place on a training course relevant to my job, and I believe the reason is discrimination because I am black whilst other white staff with similar experience have been given places.”

When supporting a member with a complaint of discrimination, ask whether s/he would like to be supported by a member from a relevant self-organised group within the branch (or the equalities officer), and if so, seek to ensure that

this “friend” is involved all along the way even though some employers’ procedures may seek to prevent this.

You should support the member through the relevant grievance procedure as with any other complaint (see Section 2). Ensure that the complaint of discrimination is made in writing along with any other grievance, to the employer at the outset. See also the guidance in Section 8.3 below.

UNISON provides separate guidance on handling discrimination matters. See UNISON’s guide to key employment rights “The Law and You”.

*Remember,* discrimination on any of the grounds mentioned in Section 8.1 above is unlawful and you should seek advice about whether a claim should be made to an employment tribunal via your branch secretary and regional organiser. Advise the member that an application to an employment tribunal must be made within three months of the date of the “incident”. As a precaution at this stage, you should ensure that a copy of a completed UNISON caseform is sent to your branch secretary (who will in turn send it to the regional office) so that the prospects of making an application to an employment tribunal can be assessed. Don’t wait for the internal procedure to finish!

## **8.3 Representing a member who is harassed or bullied**

*Harassment and bullying is a difficult issue.* Sometimes the complainant is afraid to complain for fear of reprisal or embarrassment. And there will seldom be witnesses to support what the complainant says.

*Stewards need to be vigilant to identify harassment and bullying.* But sometimes the complainant might prefer to raise the matter first by contacting the branch equalities officer or branch secretary. Whoever is contacted

first, the first response should be to suggest a private meeting involving the member and steward. Support from workplace colleagues will be harder to find if the steward remains excluded.

*Listen to the member.* As in any other case, interview your member, be patient, hear what the member wants and don't be judgemental.

*Examine the employer's procedure* – It may be a straight forward grievance procedure or one specifically designed to address complaints of discrimination, harassment or bullying. Whatever the name, be sure the procedure does not aim to “choose” between employees. It should recognise the responsibility of the employer to protect its employees by ensuring that it is designed solely to determine whether the grievance is upheld. The disciplinary procedure should be used to address the case of an employee accused of discrimination, harassment or bullying, whether a manager or work colleague. The procedure should tell you and the member how to raise the issue with the employer, and how to proceed if the harasser is the line manager.

Ensure that the complaint is raised in writing with the employer and that you keep a copy. Failure to do so may prejudice your member's case should it need to be referred to an employment tribunal at a later stage.

*Think about whether there may be a right to make a complaint to the employment tribunal.* It may be necessary to make an application to an employment tribunal within three months of the date of the “incident”. As a precaution at this stage, you should therefore ensure that a copy of a completed UNISON caseform is sent to your branch secretary (who will in turn send it to the regional office) so that the prospects of making an application to an employment tribunal can be assessed. Don't wait for the internal procedure to finish.

**You can make a complaint to the employment tribunal if you think the harassment, discrimination or victimisation arises from the member's sex, race, disability, sexual orientation, political or religious belief, age, fixed-term or part-time status or because the member has asserted a statutory right [see “The Law on Discrimination, Harassment & Bullying “ below].**

*Has the harasser been told to stop?*

Sometimes harassers might not recognise the effect of their actions. Advise the member to ask the harasser to stop and explain that the comments, actions or advances are unwelcome. Ask whether you should accompany your member to see the harasser or whether you should see the harasser yourself. If the member has already told the manager (or equalities officer or other), then you will need to know what action they have taken to ask the harasser to stop

*Are there witnesses or other evidence?* Note that employment tribunals acknowledge that there will seldom be witnesses, and will generally conclude that harassment has taken place if there is no credible alternative explanation for the actions or alternative motive for the complaint. Backed up by the branch's statement [see 8 above], you could speak privately with other members but only with the complainant's agreement . Sometimes this might encourage past victims to come forward. A collective voice and the awareness of colleagues is a good way to prevent further harassment and reprisals [see Section 3].

*Record evidence.* If you don't think there is enough to go on at the moment or if the harasser has been told to stop, ask the member to keep a diary and to record anything that happens in as much detail as possible.

*Emotional support for the member.* Ensure your member is aware of others who can give support alongside yourself – eg. the branch equalities officer, branch welfare officer, a relevant self-organised group or another member who has experienced a similar

problem in the past.

*Intermediate solutions.* Does your member want to be separated from working with the alleged harasser whilst investigations proceed? The wishes of the complainant should be paramount here and you should

## **The Law on Discrimination, Victimisation, Harassment & Bullying**

The Equality Act 2010 protects against certain types of discrimination in the workplace. A person can complain to an Employment Tribunal within 3 months (less one day) if s/he is directly or indirectly discriminated against, if victimised or harassed.

It is important that you refer any such complaint as soon as possible to your branch secretary or regional office using the UNISON case form given this very short time within which to bring a claim. UNISON will not be able to assist the member after the deadline has passed. Be proactive and check that the case form has been received and is being acted upon.

The summary below is a snapshot of the law, but further advice must be taken when you are dealing with a case of this kind.

### **Discrimination**

**Direct Discrimination** – The Equality Act 2010 makes it an offence for a person to treat someone less favourably than s/he would treat another person because of their age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex, or sexual orientation.

A person/employer cannot justify direct discrimination except in the case of age where it can be shown that this treatment is a “proportionate means of achieving a legitimate aim”.

**Indirect Discrimination** – Occurs where an employer applies a provision, criterion or practice to an employee which is itself discriminatory in relation to that employee’s age, disability, gender reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex, or sexual orientation.

**Victimisation** – The Equality Act 2010 has changed the law so that a person complaining about victimisation only has to show that s/he has been treated badly, and no longer that s/he has been treated worse than a comparator. So a person (B) is victimised if another person or employer (A) subjects her/him to a detriment because A believes B has or may:

- bring proceedings under the Equality Act 2010;
- give evidence or information under the equality Act 2010;
- do any other thing in connection with the equality Act 2010; or
- make an allegation that A or another person has contravened the Equality Act 2010

**Harassment** – Under the Equality Act 2010 a person (A) is harassed if another (B) engages in unwanted conduct which has the purpose or effect of violating A’s dignity; or creates an intimidating, hostile, degrading, humiliating or offensive environment. A complaint of harassment can only be brought if it relates to A’s age, disability, gender assignment, race,

religion or belief, sex or sexual orientation.

In addition, The Criminal Justice & Public Order Act 1994 (which applies only in England and Wales) makes it a criminal offence “if, with intent to cause a person harassment, alarm or distress (a person) (a) uses threatening, abusive or insulting language or behaviour, or disorderly behaviour or (b) displays any writing, sign or other visible representation which is threatening, abusive, or insulting” so that another person feels harassment, alarm or distress. This offence is punishable by a maximum prison sentence of six months and/or a fine of up to £5,000. People have also successfully used the Protection from Harassment Act 1997 (known as “the stalker’s act”) which has criminal and civil

remedies including a fine or six months imprisonment (criminal sanctions) or damages and restraining orders backed by powers of arrest (civil remedies). However, these claims have a higher threshold and are difficult to prove.

Bullying- There are no standalone claims that may be made for “bullying”.

Associative Discrimination – A person can also bring a claim where s/he has been discriminated against because of a third party’s disability, gender assignment, race, religion or belief, sex or sexual orientation. For example, a white employee who is dismissed for refusing to comply with an instruction not to give support to a black client.

resist the proposal to move the member rather than the alleged harasser, unless that is what your member wants.

*Resolution.* The outcome you should be looking for is one that will provide permanent security for your member. Whilst the question of disciplinary action against the harasser will be a private matter and subject to the separate disciplinary procedure, you should ensure that any solution leaves your member vindicated and feeling reassured of employer support. It may be a solution that removes the harasser from future contact with your member. It must leave your member reassured that the action will not be repeated. Your member should not suffer any detriment and any loss should be restored. Beware solutions based on “mediation” that imply some equal fault between two employees and that the employer has no responsibility.

*If the complaint is against YOU.* If you become aware of a complaint against yourself as a UNISON representative, you should report it immediately to your Branch Secretary so

that any implications for the complainant and yourself can be appropriately addressed. It is important that the member should be reassured that UNISON can always deal with complaints objectively and be supportive, and equally you given appropriate support and advice.

Separate advice on procedures for dealing with bullying, harassment or discrimination in the workplace is to be found on UNISON’s web-site [www.unison.org.uk](http://www.unison.org.uk).

#### **8.4 Where a member accused of harassment or bullying seeks assistance**

This frequently causes great difficulty to UNISON representatives committed to stamping out personal abuse and harassment.

*Every member has a right to turn to UNISON for support and it is important that the principles in Section 2 are fully understood and followed. It is not UNISON policy to refuse assistance to a member accused of harassment or bullying, provided that the*



assistance sought permits you to approach the question of advice and representation as outlined in Section 2 of this guide. It is in everyone's interest that a member accused of harassment or bullying receives fair treatment.

Also, although rare, false allegations of harassment are sometimes made for malicious purposes or prejudiced reasons. For example, lesbian, gay and bisexual workers may be particularly vulnerable to charges of sexual harassment for behaviour (or imagined behaviour) that would be seen as "acceptable" in a heterosexual worker; or a woman criticised for behaviour considered acceptable in a man.

See also Section 4.1.1 in a grievance hearing, a manager accused of harassment or bullying is not entitled to UNISON assistance.

#### **8.4.1 Interviewing the member**

■ If you are already advising or representing the complainant then you must find another UNISON representative to interview this member. Don't simply refer the member to someone else – fix up the appointment yourself. The other representative should be of similar status and experience to yourself.

■ Follow the guidance in Section 2.4 about interviewing your member.

■ In particular, LISTEN to what the member is telling you.

■ Don't make assumptions of guilt or innocence.

■ Explain UNISON's policy on harassment [outlined in this section] and representation [Section 2].

Key questions that you'll need answered are:

■ Does your member admit saying or doing what is alleged?

—If "no" then why should the allegation have been made? Is there any evidence the member can offer in support?

—If "yes" then why and under what circumstances, and how does the member feel now about what s/he has said or done?

■ What assistance does the member want; what outcome is s/he hoping for?

■ What is your assessment of the evidence produced? If it is strong then you must discuss the merits of the case with your member and seek an agreement on how to proceed [as outlined in Section 2].

If...

■ Your member denies the allegations, then you should represent the member following the guidance set out in Section 2.

■ Your member admits the allegations, and appears genuinely sorry and willing to make amends, then you should agree to assist and advise on that basis – admitting the charge but pleading some mitigation

■ Your member admits the allegations but is unabashed, unwilling to apologise or make amends, then you should not proceed to represent. You should advise the member that any request for further assistance should be referred to the branch secretary who may in turn refer the matter to the branch representation sub-committee [Section 4.2].

Where you are providing representation to the alleged harasser, you should notify your branch secretary in order to avoid any misunderstanding or conflict of interest.

#### **8.4.2 At the hearing**

See the guidance in Section 2.6 on presenting the case.

What you must NOT do is:

■ lie for your member

■ excuse or justify harassment or bullying

■ try to frustrate the process

■ seek to persuade the complainant to "drop"



the complaint

- try any form of “character assassination” on the complainant or any witnesses.

### **8.4.3 Representing at appeal**

If the case against a harasser is found, then UNISON can no longer provide assistance because such conduct is contrary to the conditions of behaviour set out in our Rule Book.

- Advise the member of any rights of appeal to the employer or an employment tribunal.

- Explain why UNISON cannot continue to support the case.

The only exception to this is where you genuinely believe there have been inadequacies in the conduct of the hearing or investigation procedure that have resulted in a blatantly unfair outcome. Such occasions will be rare and should be referred to the branch secretary and branch presentation sub-committee for endorsement.

## 9. Capability cases

**This section will help you to represent members in cases where the employer is raising questions over a worker's ability to perform their job.**

**Usually such cases fall into two categories:**

- **health related**
- **competency.**

**The two categories demand a different type of approach in respect to the way in which you help a member prepare her/his case.**

In many cases UNISON will have negotiated a capability procedure with the employer that seeks to recognise that capability (or incapability to perform the tasks of a job) is not the same as conduct. Where no such procedure exists, it will be important for you to ensure that the employer recognises this distinction at the outset, otherwise your member's employment rights may be undermined and action taken against your member may be unlawful.

### 9.1 Health-related capability

An employer may commence capability proceedings in response to an employee's sickness record – where there is persistent short-term sickness or following long-term sickness. In both cases it will be because the employer believes that the employee is unable to fulfil the full requirements of their role.

Note. The formal procedure is different from a "return to work" interview that seeks to establish that the employee is fit to resume

work and to identify any limitations and assistance required.

#### 9.1.1 The key issues for your member will be:

- The medical prognosis – has the ill-health problem been resolved?
- If not, then when may the employee be fit to resume work?
- If the employee is ready to resume work or anticipates returning in the near future, are there any changes or help needed to enable the employee to perform her/his duties?
- Is the health problem due to the working environment or equipment used?

You will need to know from your member as much about the implications of the illness as possible. This will take tact and reassurance when you interview the member. Your member may feel it to be an invasion of their privacy or feel uncomfortable discussing such sensitive matters.

Explain that all information provided will remain confidential between you and the member, and will only be used with the member's consent. Reassuring your member at this stage will help to build her/his confidence and trust both in you and the process. If your member is still unwilling to share the information, ask them if they would like to discuss the matter with another officer in the branch – eg branch welfare officer or equalities officer if disability is an issue, who could then remain involved to support the member.

### 9.1.2 Medical evidence.

The employer's first steps will usually also be to get to understand the illness and prognosis better. Your member may be asked to submit to a medical examination, most probably with an occupational health adviser. You should advise the member that the employer can only access this information with the members written consent [s3 (1) Access to Medical Records Act 1988] and that the member can see a copy of any report before it is sent to the employer and have an opportunity to comment on its content. You should normally advise your member to comply.

Where your member disagrees with the medical evidence, alternative views can be obtained:

- by the member from her/his general practitioner
- from a specialist agreed by you and paid for by the employer.

Exceptionally, the branch may need to pay for medical or specialist reports.

### 9.2 Competency

An employer may commence proceedings against an employee as a result of poor performance not through misconduct. There may be many reasons and you should discuss any allegations and observations made by the employer with your member.

- Has your member been given adequate training?
- Has your member received support if and when things went wrong?
- Have problems been drawn to the attention of your member and has s/he been given support to put things right?
- Are there issues at work that are preventing your member from getting on with the job (for example, the actions of other people, systems that don't work or are inaccessible).

- Have the requirements of the job changed recently?

*Note:* poor performance by an employee may be a reflection of a poor interview and appointment procedure, poor training provision, or poor management or supervision. Sometimes it can signal relationship issues, even workplace bullying or discrimination.

Listen to what your member has to say and prepare your case accordingly.

### 9.3 Capability proceedings

The employer must meet with the member and yourself to discuss any medical opinions and to allow your member to respond.

*Note.* Warnings issued by the employer are not appropriate to capability matters. The issue will be whether or not the employee can become fit or capable of carrying out the requirements of the job if:

- adjustments are made to the job or the working conditions to enable the disabled employee to perform her/his role [see Equality Act box overleaf]
- additional training and support is provided
- some other assistance, action or change is made to enable the employee to return to work.

Your emphasis should be on seeking agreement on the circumstances of a return to work. Note that the government provides a range of support to assist disabled workers to continue working through the Access to Work Scheme [see box below]. Employees who have a physical or mental impairment which has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities have legal rights under the Equality Act 2010, but these rights and the approach to meeting them should be argued as good practice by any employer.

## **Access to Work Scheme**

**Help from the government is available to support disabled workers. There is a range of support available that can remove barriers to the workplace, though disabled workers must meet certain criteria. For example they must show they need support to start a new job or to gain a promotion.**

**The type of support available could include assistance with transport costs, refurbishment of premises such as the installation of a ramp or funding for training – for example to learn how to use software that makes information accessible, sign language interpretation services or a reader service. The Access to Work Scheme may expect the employer to make a contribution to the cost of the support.**

**UNISON has produced guidance for branches to use in supporting members' applications for ATW support.**

## **Disability Discrimination Law**

**Under the Equality Act 2010 (s.6) a person has a “disability” if s/he has a physical or mental impairment that has a substantial and long-term adverse impact on her or his ability to carry out normal day-to-day activities.**

**A disabled person is discriminated against if s/he is treated unfavourably because of something arising in consequence of their ability, and the person discriminating cannot show that the treatment is a proportionate means of achieving a legitimate aim (s.15 Equality Act 2010).**

**The Equality Act 2010 requires an employer to make “reasonable adjustments” where:**

- **an employer's provision, criteria or practices put a disabled person at a “substantial disadvantage” compared with a person who is not disabled;**
- **An employer's premises have physical features which puts a disabled person at a substantial disadvantage;**
- **A disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid.**

**You are strongly advised to seek further guidance if you are unsure about the implications of this Act. (see also box on page 38 for further information)**

If an employer fails or refuses to make reasonable adjustments, your member may be entitled to make a claim of Disability Discrimination to an employment tribunal. Advise your member that this complaint must be put in writing to the employer and contact your regional organiser (through your branch secretary) for guidance on the employment tribunal.

If it is not possible to make reasonable adjustments or otherwise facilitate your member's return to work in the same job, other possibilities short of termination of employment should be considered. Press the employer to find an alternative job and suggest that a trial period, and/or a phased return to work would be appropriate as a means of supporting your member – these are equally solutions that must be considered by the employer as “reasonable adjustments”.

An employer's decision to terminate employment or to redeploy may be influenced by the size of the organisation, the business and the availability of other jobs. The employer is not obliged to create a job, but if it is not possible to make reasonable adjustments, you may be able to persuade the employer to accommodate your member in some other way.

**Remember, your member has the same rights to a fair hearing and appeal in respect of any decision reached.**

## 9.4 Summary

- Understand the employer's procedure – if the employer does not have a procedure, press for one to be negotiated.
- Reassure your member that any information will be kept in confidence.
- Try to understand the nature of the illness, be sympathetic and never be judgmental.
- Try to understand the barriers at work and facilities that need to be provided.
- Tell your member about the provisions of the Access to Medical Records Act.
- Try to resolve any conflict in the medical reports.
- Try to engage the employer in a process that is supportive and encouraging and away from issuing blunt warnings that are likely to result in more pressure on the member.
- Ensure that decisions are only taken after a reasonable period of time.
- If the matter proceeds to a formal hearing, help the member to prepare the case. Have regard to any workplace issues that may undermine your member's competency or that need to be addressed for your member to return or resume working.
- Press for alternative redeployment and/or changes made to the member's job to help facilitate a phased return to work.

Always advise your member that if they are dismissed they may be able to present their case to an employment tribunal. Such cases have to be lodged within three months of the date on which the employment is terminated.

## 10. Equal Pay

**This section will help you understand the basics of the law on Equal Pay and will direct you to sources where you can gain more information in relation to the complexities of Equal Pay Claims and how UNISON is approaching Mass Litigation.**

### 10.1 What is Equal Pay?

The right to Equal Pay applies to individuals employed in establishments in Great Britain, whether they are British or not, and regardless of the law governing their contracts of employment.

The right to Equal Pay applies to both men and women and means that members should not receive less pay than someone else because of their gender. The Equality Act 2010 does not simply *prohibit* direct or indirect discrimination in pay; instead it adopts the artificial approach of implying an “a Sex Equality Clause” into any contract of employment that does not already include one. The effect of the Sex Equality Clause will modify a woman’s contract where she is engaged:-

- (i) On *like work* to a man; or
- (ii) On work rated as *equivalent* to work done by a man;
- (iii) On work of *equal value* to that done by a man;

and her employer does not establish that the difference between the woman’s contract and the man’s contract is due to a Material Factor, which is not the difference of gender.

The Sex Equality Clause will operate so that

if any term of the woman’s contract is less favourable to that woman, than the term of a similar kind in a man’s contract, then the term in the woman’s contract is modified to become as favourable as the corresponding term in the man’s contract. Alternatively, if at any time a woman’s contract does not include the beneficial term that is in a man’s contract, the woman’s contract will be modified to include that term.

#### Example

If a man and woman are engaged on like work and the man is paid £500 per week for that work and the woman is paid only £400 per week, the Sex Equality Clause would operate so as to entitle the woman to £500 per week.

The Sex Equality Clause applies to all terms and conditions of employment, not only to the term relating to pay.

**10.1.1** If a member can establish that her work is equal to a comparator of the opposite sex, she will be entitled to receive the same pay as her comparator going forward and can also claim up to six years arrears of pay.

However, an employer will be able to defeat a claim if it can show that:-

- (i) The work of the member and the named comparator are not equal, and/or;
- (ii) The reason for the difference in pay is not connected to gender.

## 10.2 Types Of Claim

There are three different types of equal pay claim that can be taken under the Equality Act 2010:-

### Like Work

A woman is regarded as being employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature and the differences (if any) between the things she does and the things that they do are not of practical importance in relation to the performance of her contract of employment.

On this basis, even if the job descriptions of the male and female employees are different, if the difference in their duties is of no practical importance the woman will be considered to be employed on like work with the man.

### Work Rated as Equivalent

A woman may claim equivalence with the man even though she is not engaged on like work, if a job evaluation study has been carried out in respect of his work and hers and her job has been rated as equivalent to the man's in terms of the demands made on that worker under various headings such as efforts, skill and decision-making.

If no Job Evaluation Study has been carried out, there is no legal requirement for an employer to conduct one. However, once a Job Evaluation Study has been undertaken and has concluded that the job of a woman has the same rating as that of the man, the woman may claim Equal Pay despite the fact that her employers may not have implemented the Scheme.

### Equal Value

Where a woman is employed on work that

is not *like work* or *work rated as equivalent* to that of a male comparator, she may claim Equal Pay with a man if her work is of *equal value* to his, in terms of the demands made on her under such headings as effort, skill and decision-making.

For example, Equal Value comparisons that have succeeded in the past include speech therapists comparing themselves to clinical psychologists, cooks comparing themselves to carpenters and kitchen assistants comparing themselves to refuge workers.

## 10.3 Comparators

A man with whom a woman seeks to compare herself with is known as the "*comparator.*" In contrast to Sex Discrimination claims the employee cannot usually use a hypothetical comparator. In most cases she must identify a real male comparator. It is for the claimant to select the man with whom she wishes to be compared. If the case proceeds to an Employment Tribunal hearing, the Tribunal is not entitled to substitute its own choice of comparator in place of the one selected by the member, and it is also inappropriate for the employer to try to influence the member's choice of comparator.

The member must be able to point to a comparator "*in the same employment.*" This means that the comparator must work at the same establishment as her or one where "*common terms and conditions*" apply. In either case, the member and the comparator must be employed by the same employer or by an associated employer.

## 10.4 Time Limits

There are very strict time limits in relation to claims for equal pay and you should bear in mind the following information when considering a potential claim. If these dates



are not met, claims will fail as being out of time. Unlike claims for unfair dismissal or discrimination, the Tribunal is unable to grant an extension of time if a member's claim is lodged outside the strict time limits.

The time limits are also very short. Action needs to be taken to protect an equal pay claim within **six months** of the end of the employment or where there is a fundamental change in the job or employment contract.

Time begins to run either:

- from the date the member's **employment comes to an end** for any reason, such as resigning or retiring; or
- from the date of a **change of job with the same employer**; or
- when there is a **change of contract with the same employer**, such as when the member's terms and conditions of employment have changed whether or not the member was required to sign a new contract. For example, this may simply be a change of hours; or
- where the member continues in the same job but **the member's job is transferred to a new employer** (sometimes known as **TUPE transfer**) from the date of transfer to the new employer.

It is therefore crucial that members are aware of whether or not the clock has started ticking in respect of their potential claim.

## 10.5 Representing Members

In many cases, UNISON will be able to lodge a *collective grievance* on behalf of at least 2 members who have equal pay claims. In this case there will be no need for the member to attend a grievance hearing.

However, there will be some situations because of time limits; a member may be required to lodge an individual grievance because he or she cannot wait until the time

when a collective grievance is to be lodged.

In these situations, you may be required to represent the member at a grievance hearing.

### 10.5.1 At the Grievance Hearing

See the guidance in Section 2.6 on presenting the case.

For Equal Pay grievance hearings, you will need to be clear about the following when you are preparing for the hearing:-

- Who is the Comparator that your member wishes to rely on?
- Is the member claiming that she is carrying out *like work*, *work rated as equivalent*, or *work of equal value* to the named Comparator?
- For what period of time does your member say that she has been carrying out equal work to the named Comparator?
- Do you anticipate that the employer will be able to show that the difference in pay is unconnected to gender?

## 10.6 Sources of Information

As with any potential Employment Tribunal case, it is important that the branch secretary forwards the member's completed and up to date case paper to your regional organiser as soon as possible so that the case can be assessed and referred to solicitors.

UNISON's web site carries in depth information and guidance about equal pay and UNISON's campaigns.

## 10.7 Key tasks for stewards

Whether you are representing a member in a local grievance hearing, or have a member whose case is being supported by a UNISON solicitor, there are important tasks that you can do to assist your member(s).

- Tell your members about UNISON's equal pay campaign so members can think about whether they have a complaint;

- Help by finding a comparator – the comparator has nothing to fear – it does not involve him personally;
- Obtain the job descriptions and, if the two jobs have been evaluated using a job evaluation scheme, the job profiles for each post;
- Keep your eye on the time limits and advise your members;
- Keep yourself informed about the progress of a case referred to your regional organiser, and reassure your member – these cases can take a long time to resolve.

# 11. Cases involving UNISON representatives

This section addresses the special circumstances if you are:

- the member requesting advice and representation
- a witness in a member's case
- the subject of a complaint by another member.

## 11.1 Stewards and other branch officers who have grievances or face disciplinary proceedings

Every UNISON member is equally important and being a UNISON official doesn't bring special privileges when it comes to assistance. If they are at fault in their work, then they will face the same consequences as any other employee. BUT stewards can become unpopular with some managers; they may be victimised – made the target of unjust disciplinary action, prevented from carrying out union duties or treated less favourably than others and have a legitimate grievance. Victimisation of someone because of their trades union activity is unlawful and if you believe this has occurred then it is important that the branch secretary and regional organiser are both advised. They can then both take the matter up with the employer and, if necessary, consider referring the case to the employment tribunal.

### 11.1.1 Grievances:

Branch secretaries should raise concerns with the "personnel officer" if there appears to be evidence of victimisation or unequal treatment of your steward. Intervention by the personnel officer might avoid relationships breaking down further through a formal hearing. You should discuss with the regional organiser whether a grievance and/or an employment tribunal claim should be lodged.

### 11.1.2 Discipline:

The employer's disciplinary procedure should provide that no disciplinary action be taken against a UNISON official until the matter has first been discussed with the union's "full-time official" [branch secretary or regional organiser]. This is recommended in the ACAS Code on Disciplinary and Grievance Procedures and is to ensure you can be satisfied that the action is genuine and that there is a case to answer. If you are not satisfied and the employer intends to proceed then you must IMMEDIATELY contact your regional organiser. A claim for interim relief to the employment tribunal must be made, if appropriate, within 7 days.

## 11.2 Stewards who are witnesses in their member's case

If you have a direct interest in a member's case, for example because you are a witness or related, it is generally better to ask another UNISON representative to present the case. This will make your evidence appear more objective and add greater emphasis to any evidence you give.

### **11.3 Complaints against branch officers**

**Complaints against UNISON officials can be difficult to accept – they are against “one of us”. We know they can be simply because a member feels let down when the steward failed to achieve the outcome they had hoped for; or it could be someone with a political grudge, even a complaint engineered by an aggrieved manager.**

**BUT UNISON believes in high standards of service and support. Sometimes complaints will be justified, feelings may have been injured and confidence in UNISON undermined.**

**It is vital that we respond to complaints efficiently, sensitively and clearly, otherwise we will appear no better than the worst of employers – unresponsive, arrogant, monolithic.**

**Note, members wishing to make a formal complaint may choose to use UNISON’s formal Complaints Procedure by writing to the General Secretary and should be offered that opportunity. A copy of UNISON’s procedure can be found on the UNISON web site.**

**The branch or region may have a defined procedure for responding to complaints made against branch officers. The disciplinary procedure against a branch officer is set out in UNISON Rule I and is conducted by the National Executive Council.**

11.3.1 In the first instance, encourage the member to raise the issue directly with the steward/officer concerned, either verbally or in writing. Many problems arise through misunderstandings and can be resolved with clear communication. By discussing it with the representative, the member might be able to resolve the matter without any further

action. You may ask the branch secretary to appoint another branch officer to facilitate this discussion.

11.3.2 If this does not, or will not, resolve the issue then refer a complaint about a fellow steward to the branch secretary. You should politely ask the member whether the complaint can be put in writing.

11.3.3 Depending on the situation, you may want to advise the member to talk the matter through with the branch equalities officer or a representative from a self-organised group.

11.3.4 The steward may also need some support or advice and could be offered the opportunity to discuss the situation with a senior branch officer.

11.3.5 The branch secretary should ensure that any complaint is dealt with in accordance with any regional or branch procedure, noting that any proposed disciplinary action against a branch officer must be referred to the National Executive Council in accordance with UNISON Rule I. In responding to the member’s complaint, the branch secretary should:

11.3.6 LISTEN to what the member is saying and ask what action or response the member is seeking.

11.3.7 As with any complaint, ensure that the complainant is kept informed of what is happening. Note: many complaints become aggravated matters simply through the complainant thinking no-one is interested or dealing with the matter.

11.3.8 See the steward and ask for her/his account.

11.3.9 Satisfy yourself that the complaint is against your steward as a UNISON official and not as an employee. If the complaint is about her/him functioning as a steward, you might:

■ consider a meeting between the two, with you present, or advise the steward on how to

rebuild confidence

- consider whether guidance or training is needed for the steward

- consider whether the allegations are so serious as to warrant a Rule I investigation, in which case you should discuss the matter with your regional organiser.

11.3.10 If the complaint is about conduct as an employee, you should consider whether the complainant should be assisted in raising the matter with the employer. Any question or dispute about representing the member or steward should be referred to the branch representation sub-committee.

11.3.11 If you come to a view that the member's complaint is not justified then don't be afraid to say so – but do so politely and firmly.

11.3.12 Ensure the member is given a written record of your decision and if the process isn't completed speedily, ensure that the member is kept up to date with any developments.

REMEMBER, we cannot afford “cover ups” which would further undermine confidence in ourselves and in UNISON. If we have made mistakes it is better to admit it and win the confidence of the member that we learn from them.

Notwithstanding, should a member threaten any legal action against a UNISON representative or the branch, the regional organiser should be notified immediately and UNISON solicitors will be instructed to assist.

## 12. Legal representation

### 12.1 Legal advice

From time to time, UNISON representatives will need legal representation or advice.

UNISON is organised to provide support, guidance and information to our representatives, whether from the branch secretary or regional organiser, backed up by legal advice. The assistance that all our representatives can give a member is therefore of vital importance.

The occasions when UNISON will provide a solicitor to represent a member are specific and are covered by UNISON rule:

- personal injury cases
- representation in criminal proceedings arising from matters in connection with a member's employment.

On employment law matters, the first stage in any case is to raise the complaint with the employer in writing. Any case which eventually finds its way to an employment tribunal should first have been considered by the employer in a grievance or disciplinary hearing. In fact, the

tribunals expect the cases which they hear to have completed to any internal appeal – even though we may not wait for that to happen before making an application to the tribunal because of the strict time limits for doing so. [see box “Employment Tribunals” at the end of section 2 and 12.3 below].

The work of UNISON's local representatives is therefore just as important as that taken at a later stage by a regional organiser or solicitor.

#### ***“I want a solicitor”***

- Listen to what is worrying the member.
- If you don't know the answer, reassure your member that you know someone who will.
- Or call your branch secretary who may already know the answer.
- Finally, contact your regional organiser. If necessary, your regional organiser can obtain advice from UNISON's solicitors or from our own legal department.

#### **Instructing Solicitors**

Only UNISON's regional and national managers can instruct solicitors in accordance with laid down procedures, including those explained in this guide. UNISON has contracts with approved firms of solicitors to cover all legal matters, including conflict of interest. These firms are carefully chosen for their competence and standards, and their performance closely monitored. Only these firms will be used.

Under no circumstances should solicitors and/or counsel be instructed by branch officers. Appropriate action will be taken under Rule I where members are referred to solicitors without authority.

UNISON cannot be held liable for any private legal expenses incurred by the member – See also Section 1.4

In the case of members who instruct solicitors themselves, UNISON will not be held liable for any costs or other issues arising. Privately instructing a firm of solicitors will normally mean that UNISON can no longer provide advice and representation – to do so may bring a conflict under UNISON’s rules and those of the Law Society. A member who has already instructed solicitors to act at the time of seeking UNISON assistance should be advised of these circumstances; that UNISON provides our own solicitors, at no charge to the member; that the member should end the private arrangement and that UNISON will determine whether our solicitors should be instructed using the procedures identified in this guide.

UNISON stewards and branches may be approached, in particular, by “no win, no fee” lawyers (NWNF) seeking information. In such an event, stewards and branches should seek advice from their regional office immediately.

**Note:**

NWNF lawyers charge a percentage of any damages they win from their clients – unlike UNISON.

They are private businesses concerned primarily with making a profit, and not the needs of our union or its members.

NWNF lawyers walk away after any case has been settled. UNISON however wants settlements that are robust and in the best long-term interests of our members.

NWNF lawyers are unlikely to be aware of the bargaining context – for example in equal pay cases. Some employers threaten to privatise services when faced with litigation. NWNF lawyers cannot deal effectively with such threats, but the union can through organising its members.

NWNF lawyers have an incentive to talk up the prospects of succeeding and often raise expectations in an attempt to sign up union members.

NWNF lawyers can and do turn down valid cases on the ground that they are not “economic”

NWNF lawyers have been known to cite union activists as individual respondents in discrimination claims, arguing the representative is jointly responsible with the employer for not resolving the issue.

NWNF lawyers may well not recognise trade unions in respect of their own staff.

## **12.2 Criminal law advice & representation**

If a member is arrested or given notice to attend a police interview on a work related matter; or in special circumstances (see below) attend an inquest on a work-related matter, they can access UNISON’s criminal law scheme. This can be done by completing Union form CR or by calling UNISONdirect

(0845 355 0845) during office hours or the 24 hours emergency helpline 0800 587 7530, outside UNISONdirect hours.

In every request for advice and representation, a UNISON Form CR must be completed and faxed by the branch secretary to the Legal Services at UNISON Centre – this can be retrospective .



In the case of non work-related criminal matters, the member will be offered 30 minutes of free legal advice from a solicitor appointed by UNISON. If the member wants a solicitor on a private basis, this may be arranged at that time.

The provision of legal advice and representation does not extend to:

- Drink driving offences
- Road traffic offences unless the member's job is at risk
- Assistance and representation for criminal proceedings where the member's role is solely as a witness. In exceptional circumstances representation may be given to members in giving evidence at an inquest arising out of a work related matter, such as where they may incriminate themselves in those proceedings.
- Representation is at the discretion of the NEC. The NEC can also decide to refuse representation where a member is pleading guilty.

Further information can be found at <http://www.unison.org.uk/acrobat/C2825.pdf>

### 12.3 Employment tribunals

Cases which you think may need to go to an employment tribunal should be referred to your regional organiser without delay. Although time limits for making an application to an employment tribunal may vary, you should assume that the application needs to be made within three months of the action being complained about.

- Ensure your member has registered their complaint or appeal with the employer in writing.
- Send a completed Case Form to your regional organiser at the earliest opportunity – even if the local procedure hasn't completed, alert the regional office 2 months from the

trigger date in the case of grievances, and immediately a member is dismissed.

- Enclose any information and copies of any documents or papers relevant to the case.
- Don't wait for any internal appeal to be heard – send a UNISON caseform and copies of all papers via your branch secretary, to the regional organiser well before the expiry of the normal time limit (eg three months).
- On receipt of your paperwork, your regional organiser should contact you promptly. Your regional organiser will make an assessment of whether an application should be made to the employment tribunal and will make arrangements to speak with your member(s).
- If advice is needed from a solicitor, your regional organiser will obtain it.
- Your regional organiser will explore any possibility of resolving the case without proceeding to a tribunal hearing. However, most potential employment tribunal cases will then be referred to UNISON's solicitors.
- When a case has been referred to our solicitors, the member will be sent a letter informing of this and also any expectations of the member.

- The solicitor will usually arrange to meet your member soon, preferably with the member's local representative.

- The solicitor and/or regional organiser will keep the branch secretary informed of key developments as the case progresses.

[see also blue text in Section 2.6]

*Remember* Time limits for making an application to the employment tribunal vary according to the type of complaint and can be complicated. If you believe a case cannot or has not been fairly resolved with the employer, TAKE ADVICE from your regional organiser

### 12.3.1 Employment tribunal cases

Employment tribunals cannot hear just any complaint arising from work. They have jurisdiction to hear particular categories of complaint brought by employees or former employees. The most common are:

*Unfair dismissal* – It might seem like rough justice by the employer but not every dismissal is “unfair” in the eyes of the law. The tribunals have established a range of tests and expectations about how the employer should have reached a decision to dismiss. This is why every lost appeal against dismissal should be considered and advice obtained about whether to proceed to a tribunal.

*Constructive dismissal* – is a form of unfair dismissal and arises where an employee believes that the employer has done something which makes it impossible for that member to remain at work. These types of cases are extremely difficult to argue successfully and we should never advise a member to hand in her/his notice to make a point.

*Discrimination* – Complaints of less favourable treatment because of a member’s age, disability, gender assignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex or sexual orientation or fixed-term or part-time status, are heard by employment tribunals. As are claims of victimisation as a result of exercising a legal right, eg “whistle-blowing”.

*Unfair selection for redundancy* – Employers are expected to seek to avoid redundancy if a situation arises; and they are expected to have consistent and fair rules when deciding which employees should be made redundant if not all.

*Pay* – Employers are expected to pay an employee’s wages in full and to not make any deduction without the employee’s express agreement.

*Equal Pay* – Where an employee, or group of

employees, are in the same employment but on lower pay than others of the opposite sex and whose work seems to be the same or of similar value or rated the same as the member. These types of case can be lengthy and complex and require considerable preparation. Stewards can particularly assist in obtaining relevant evidence that would help UNISON’s solicitors.

*Union duties* – If an employer prevents a UNISON steward, safety representative or learner representative, from carrying out their proper duties, including attending reasonable training to carry out those duties, then a complaint can be made to an employment tribunal.

### 12.4 Fitness to Practice

Many UNISON members, especially those working in healthcare and social work, are in occupations that require them to register with statutory or voluntary registration bodies. If for any reason they are suspended or removed from the register (“struck off”) they will be prevented from working in their registered occupation.

Service providers, managers, service users and their family and friends, colleagues, members of the public and the police all complain or report allegations against registrants to the registration bodies. In some cases they have a duty to do so.

Registration bodies have a duty to protect the public. They do this through their codes of conduct. The codes govern the conduct, competency and health requirements for people on their register. A registrant must conform to their code of conduct both inside and outside the workplace.

When a registration body receives information that a registrant may not be “fit to practice”, they immediately refer the matter to an

investigation panel. If the allegation is very serious they will require the registrant to attend an interim suspension hearing. An interim hearing is usually held very quickly – often at only 14 days notice, and the panel may decide to suspend the registrant. This has the same effect for the member as being struck off.

Registration body hearings are legalistic and formal. Effective, early representation is vital if we are to ensure that we achieve the best outcomes for our members. UNISON has a team of skilled representatives for this type of hearing based at our head office. For this reason it is also very important that all the case details are recorded on the UNISON caseform.

This area of representation is governed by a Protocol that sets out the responsibilities of branches, regions and the Professional Registration Representation Unit, and a copy can be downloaded at [http://www.unison.org.uk/acrobat/prru\\_branchprotocols.pdf](http://www.unison.org.uk/acrobat/prru_branchprotocols.pdf)

Because Fitness to Practice cases can lead to the member being prevented from practising in their profession for a lifetime, it is vital that members are advised to seek UNISON advice as soon as they become aware that the registration body is investigating a complaint. Members should be provided with a copy of the leaflet “PRRU – advice for members”, stock number 19139, or downloaded at <http://www.unison.org.uk/acrobat/19139.pdf>, ideally as soon as they make contact with the branch about a potential disciplinary issue.

## 12.5 Personal injury

UNISON provides free legal cover for members injured at work. This includes cases of physical injury, disease and psychological injury including stress. Successful claims will be those which are able to demonstrate that the employer (or other third party) has caused the injury through act or omission – something

which the employer has either a statutory duty to do (eg keeping workplaces clean and providing and maintaining safety apparatus) or which the employer could reasonably be expected to do (eg responding to initial indications of stress).

Members can also receive legal assistance where they have suffered an assault at work to assess whether they can pursue a claim through the state Criminal Injuries Compensation Scheme.

If a member has an accident, or is ill and believes this arises from work, or is the victim of a work related assault give the member UNISON Form PI or advise them to contact UNISONdirect (0845 355 0845). In cases of work related stress a special Stress Form must be completed by the Branch and the Member (see below).

In addition free legal cover is available for members and their families for accidents (including Road Traffic Accidents) outside of work. This can cover accidents abroad in certain circumstances, if they can be pursued through the UK Courts. UNISON also offers a free initial legal screening service for members and their families who have been affected by Medical Negligence. Access to these services can be gained from submitting the UNISON legal form or contacting UNISONdirect on 0845 355 0845.

## 12.6 Application forms for legal assistance

*Employment tribunals* – Use the UNISON caseform and forward with all relevant information to your regional organiser [see 10.3 above].

*Personal Injury* – work-related injury, illness, or disease; assaults at work. Form PI

*Work-related stress* – a separate procedure specifically applies for potential claims of

work-related stress. UNISON's Guide to Stress Claims (stock no 1926) gives further information. A special Stress Claim form (stock no 1984) should be used.

*Police investigations and inquests arising out of employment.* Form CR

*Road traffic accidents* resulting in personal injury, for members and members' families. Form RTA

*Conveyancing and wills* – for conveyancing at a fixed charge, and for free wills. Form CW

*Free initial legal advice for matters outside employment.* Form FLA

All forms need to be counter-signed by the branch secretary to confirm the member is "in benefit". Members who call UNISONdirect for help will have their details taken over the telephone. The application will be then progressed by UNISONdirect in the usual way.

## 13. Health & safety representatives

**Union safety representatives have powers backed by law. The Health & Safety at Work Act 1974 gives a recognised trades union the right to appoint safety representatives and for those representatives to have a safety committee with their employer. Health and safety at work is one of the most important issues for UNISON members. It is therefore of vital importance that our safety representatives are as equally capable as our stewards to represent members in the workplace on health & safety matters using the principles and guidance of this handbook.**

### 13.1 Rights and powers

The rights and powers of safety representatives are set out and explained in the Safety Representatives and Safety Committees Regulations 1977, otherwise known as ‘the Brown Book’. Copies of the booklet can be ordered free of charge from UNISON’s Communication Unit quoting “Safety Representatives and Safety Committees, stock no.1819”. They include:

- The right to investigate, in paid time, any potential hazard or dangerous occurrence at the workplace and to examine the causes of workplace accidents
- The right to investigate complaints by any employee they represent relating to that employee’s health & safety at work.
- The right to make representations to the employer.
- The right to carry out periodic inspections of the workplace in paid time.
- The right to attend meetings of the safety committee in paid time.
- The right to consult with Inspectors of the Health & Safety Executive.
- The right to consult with members or non-members where an issue might have a direct or indirect impact on UNISON members or non-members.

These are important and useful powers. For this reason UNISON encourages all of its stewards to be elected safety representatives. UNISON provides special training for our safety representatives, and additional information on safety matters.

## 14. Support for UNISON representatives

**This section looks at the support UNISON can provide for you as one of our representatives. You will find support from your branch and region, from UNISONdirect and through attending training courses.**

### 14.1 Education programmes

UNISON provides a wide range of courses for activists to enable them to gain the skills, knowledge and confidence to carry out their roles effectively.

Attending the relevant courses for elected representatives and branch officers is essential, and UNISON offers a training pathway for stewards, health and safety reps and Union Learning Reps. Training is also available for Equality Reps and branch officers, including a branch leadership programme for newly elected branch secretaries.

You can find out more information about the contents of courses and who they are aimed at on the UNISON website – [www.unison.org.uk/utrain](http://www.unison.org.uk/utrain)

The Employment Rights Act (ERA) gives rights to accredited representatives, and you can become accredited by attending the appropriate UNISON course. Courses are regularly advertised in InFocus magazine and in your Regional Education programme available from your Regional Education Officer.

UNISON is committed to supporting workplace reps not only through relevant

training but also in the branch. All new reps should complete a Trained and Active plan with a named contact in their branch who should help the new rep find opportunities to put their learning into practice. For more information please talk to your branch education co-ordinator or branch secretary in the first instance.

#### **Some key courses for workplace reps:**

**The Organising Steward.** This 5 day course is essential for new stewards. The course will help participants to understand the role of an organising union in public services, recognise the importance of equalities in UNISON, work with members to tackle issues in the workplace, handle grievance and disciplinary and similar types of cases as the representative of UNISON members, and be certified as competent to accompany members at a disciplinary and grievance hearing in order to comply with Employment Relations Act.

**Organising for Safety** – a 5 day introduction course for safety representatives introducing your role and your basic rights under the law.

**Learning in the UNISON branch** – a 5 day introduction to the role of the union learning rep, including organising around learning, skills for life and promoting learning in the workplace.

**Branch officers training** – annual residential and non-residential courses tailored to the needs of new branch secretaries, education co-ordinators, treasurers, equality officers, etc.

**Second stage courses** – short courses on key issues and skills to help build UNISON's organisation, including strategic campaigning and organising, pensions, procurement, mentoring, the law, tackling discrimination, negotiating skills, becoming a lay tutor or discussion leader.

## 14.2 Branch support

Branches may have slightly different structures but all are encouraged to elect core officers who can provide specialist advice to workplace representatives and stewards.

These may include:

- senior stewards/convenors – responsible for a section of the branch membership eg an area or department
- representatives on local negotiating committees – will have particular knowledge of local agreements and occupational issues
- equalities officer and self-organised group officers – to assist other representatives to deal with equalities issues
- health & safety officer – to give guidance and to assist stewards/safety representatives dealing with health and safety related issues
- education co-ordinator – to assist you to receive the training you need
- branch secretary – contact the branch secretary if in doubt or if you need assistance from within the branch or from your regional organiser.

UNISON has published a guide to help branches buddy and mentor local representatives, to build their confidence and experience, and so that casework is dealt with effectively at a local level without the need for every case to be escalated to the branch secretary or convenor to deal with. See "Developing and Supporting UNISON Representatives – a guide for branches", stock number 2883.

## 14.3 UNISONdirect

UNISONdirect is UNISON's contact centre for members, stewards, potential members and the general public.

Calls are answered Monday to Friday, 6am to midnight and Saturdays from 9am to 4pm. Outside of these times, callers can leave an answerphone message and UNISONdirect will call them back.

UNISONdirect processes straightforward queries for members and potential members on a range of issues including:

- sending out application packs
- providing information about UNISON
- changing addresses or other personal details on the RMS
- processing requests for advice on personal injury, illness or accident.

Many branches advertise UNISON direct to members as a first point of contact for these routine issues, helping to free up branch resources for workplace matters. Promotional items for use in branches can be ordered via the website or UNISONdirect itself.

UNISONdirect also provides members and stewards with a wide variety of UNISON factsheets and booklets on issues such as:

- health and safety
- equalities
- pensions
- employment rights
- professional issues
- education and training
- UNISON Welfare.

If more detailed information is required than is provided in UNISON documents, then UNISONdirect will seek to obtain the information or put the caller in touch with an expert in that area.



Where a member needs to speak to a local representative to progress their query, then UNISONdirect will contact the branch and pass the member's details on.

UNISONdirect contact details are:

**0845 355 0845** or **direct@unison.co.uk**

#### **14.4 UNISON regional centre**

##### **14.4.1 Regional organising staff**

Every branch can call on the support of a team of organisers to assist in all matters. Through the annual branch assessment support can be given to assist with the planned development of activists, their training needs and in particular with regard to representing members. Advice is usually available over the telephone to any branch secretary needing help with an urgent problem. For more complicated or non-urgent matters, the branch secretary must forward a completed UNISON caseform to the regional office. The regional organising team includes principally regional, area and local organisers.

##### **14.4.2 Regional specialist staff**

Regions may have certain "lead officers" or designated staff for a range of specialisms (for example education, health & safety, women, equalities).

#### **14.5 UNISON website and publications**

UNISON produces a wide range of publications that will be useful to UNISON representatives, including briefings on new developments affecting employment rights and law. These publications, together with other information, are described on UNISON's website and can be downloaded or ordered via the website. Visit **www.unison.org.uk**

## Model letter if branch withdraws continuing support

See Section 4.2.1

Dear ...

I refer to our discussion concerning your case and wish to confirm the decision of the branch (representation) committee that UNISON can no longer assist you in this matter. This decision is based on the committee's view that:

### **Examples**

- you remain unwilling to accept the advice offered to you on how UNISON might represent you
- the weight of evidence is so heavily against you that your insistence on claiming your innocence cannot be supported
- your membership of UNISON has lapsed.

This decision is final and does not affect support to you in any future matter, so long as you remain a member. If you believe that the branch has acted unfairly in reaching this decision you may appeal against the decision by writing to [the regional secretary] at the regional centre [address]. You must set out your reasons why you believe the branch's decision is unreasonably made. The branch will also be afforded the opportunity to give its reasons. [The regional secretary] will inform you of the arrangements if your appeal is to be referred to an appeals panel.

This decision does not affect your right to continue to pursue your case on your own. I therefore draw to your attention the relevant time limits for your case to proceed [*refer to internal appeal if appropriate, and "within three months of the date of (eg your dismissal)" to the employment tribunal*]

I am sorry that on this occasion the branch has been unable to help you further.

Yours sincerely

Branch Secretary

## **Model letter to a UNISON member who is to appear as a management witness**

See Section 7

Dear ....

### **Disciplinary proceedings – MS. A B, UNISON member**

I understand that you are to be called as a witness in support of the management case against our above named member. As you are also a UNISON member, I am writing to you as a matter of courtesy and out of respect for your own UNISON membership, to comment on disciplinary proceedings and the role of UNISON.

*The role of the UNISON representative in disciplinary proceedings:*

Please be reassured that UNISON has no criticism of any member who appears at disciplinary proceedings to give their honest evidence and opinion, even when that is in support of management's case against another member whom we are representing.

However, I would ask you to appreciate that whoever is the official representing the member subject to the proceedings, her or his responsibility is entirely to the case being presented on behalf of that member.

*Shouldn't disciplinary hearings be impartial?*

Certainly the employer's representatives who are hearing the case should be impartial because it is they who will be making the actual decision after hearing the evidence of both sides. However, it is not the job of UNISON's representative to be impartial. It is very specifically to present the case of the member who is facing disciplinary charges.

*What if I need help from the union?*

In most cases, those called upon to give evidence in support of the management's case will not need any assistance from the union. Witnesses are not themselves being subject to any disciplinary proceedings and should have all the advice and reassurance they need from the management who have asked them to give evidence. However, there can be occasions when this may not be the case and help from the union is needed. It may be because of the unique circumstances of the case (especially if it involves harassment). If you feel that you need advice or support from UNISON, you should contact me [or named representative] and we will make sure that an appropriate person, other than the official presenting the member in the disciplinary hearing, is put in touch with you.

I very much hope that this explanation and advice is helpful to you in your current situation.

Yours sincerely

## **Model letter to member who chooses to proceed without UNISON representation**

See Section 1.4

**A member may choose to proceed to a hearing without your support. That is the member's right and the purpose of this letter is to ensure that UNISON has discharged its responsibilities to the member, and that the member understands that we cannot be called upon at a later date to "pick up the pieces" at an appeal.**

**Where a member has rejected our advice on how and whether to proceed, this letter provides the basis of advice. It will seldom be wise for any member to proceed without any representation present at a hearing, however confident the member. This letter therefore does not advocate the idea of a representative offering continuing advice and support when not involved in the proceedings – such a position may well lead to an expectation that we would then represent at a more time-consuming appeal.**

**It may be prudent for this letter to be sent to the member by recorded delivery to protect UNISON in the event of a future complaint.**

Dear .....

I am sorry that we were unable to agree upon how to (a) handle your grievance, or (b) respond to the disciplinary allegations made against you.

I wish to place on record that UNISON was willing to assist you but that you have chosen to reject our advice and to proceed alone. Whilst that is your entitlement, it is important that you understand at this stage that UNISON would not be able to provide you with representation and support at a higher-level hearing if at this stage you unfortunately do not achieve the outcome you are seeking.

Please note the following time limits for the next stage in your case

Yours sincerely

## Model letter to member following an unsuccessful hearing

See Section 2.6.2

**This model letter contains a number of important messages:**

- **It provides you with the opportunity to reflect on the case and to take advice before continuing. Sometimes we can feel personally let down that the result hasn't gone our way and it is too easy to just plough on without stopping to think. It may be necessary for you and the member to reassess the facts and evidence of the case and to decide afresh what can be done for the member.**
- **It advises your member of the relevant time limits for an internal appeal or appeal to an industrial tribunal. It is important that any rethink you may be having over whether or not an appeal may be successful, or about whether UNISON should continue to provide support, does not prejudice the individual rights of the member to appeal.**

Dear .....

Further to the outcome of the hearing at which I assisted you, I can advise you that I am currently reflecting on the decision reached by the manager and taking advice. I intend to contact you again in the near future to decide where we go from here and how UNISON can be of continued assistance to you.

However, in the meantime I can advise you that you have a right of appeal against the decision [and the disciplinary action taken against you]. Time limits are laid down for registering an appeal and it is important that any delay in our reaching agreement on the best way forward does not lead to your losing your right to appeal as an individual.

You should be aware that if you choose not to register your appeal in writing to the employer, if you were later to take your case to an employment tribunal, and win, any compensation awarded may be reduced

Please note your entitlement to:

- a) an internal appeal – the time limits for an appeal and to whom notification should be sent will be found in your local disciplinary procedure.
- b) an appeal to an employment tribunal must be made within three months [of the last day of employment where the member has been dismissed; of the incident complained about in cases of discrimination]. Notification of an appeal can be made using form ET.1 (available from employment offices). Where UNISON is supporting your appeal, we will complete the form on your behalf.

Please ensure that you have contacted me before this time limit expires so that we can agree who should register your appeal and on what grounds.

Yours sincerely,

**Model letter Appendix E Model letter where a member seeks representation for an internal hearing and where the member has appointed an external solicitor to act in associated Employment Tribunal proceedings.**

(See section 4.1)

Dear

Re: Request for UNISON to represent you at grievance hearing

I understand that you would like the union to represent you in an internal grievance in connection with (specify type of employment tribunal claim) against your employer. I am aware that you have not to date applied for union representation in relation to this (specify type of employment tribunal claim) and instead are represented by an external solicitor or other representative.

You may not be aware that UNISON's Representation Guide states that the union cannot represent "where the member has also asked someone else to make representations to the employer". This means that we cannot act for you at the same time as another outside representative. Unfortunately we will not therefore be able to accompany you to any grievance meeting with your employer. If your solicitor is not willing or permitted to attend by your employer, you will have to attend this meeting on your own and answer any questions your employer wishes to ask you on your claim.

However I should point out that you may be entitled to union legal representation. Your solicitor is required to advise you that you may be covered by UNISON legal services in relation to this claim. If you would like to make an application for union legal assistance, please complete the attached coupon and return it to us in the freepost envelope attached and you will receive a reply within X days.

Yours sincerely

Branch Secretary

UNISON  
*the public service union*

