

Research Paper

Accompaniment and representation in workplace discipline and grievance

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Prepared by Richard Saundry, Valerie Antcliff and Carol Jones
(University of Central Lancashire)

On behalf of Acas Research and Evaluation Section

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Accompaniment and Representation in Workplace Discipline and Grievance

**Richard Saundry
Valerie Antcliff
Carol Jones**

University of Central Lancashire

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The views in this report are the authors' own and do not necessarily reflect those of Acas.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	4	
EXECUTIVE SUMMARY	5	
1. INTRODUCTION	9	
1.1 Aims and objectives	10	
2. DISCIPLINE AND GRIEVANCE – THE LEGAL AND POLICY CONTEXT	11	
2.1 Historical development of the law relating to discipline and grievance	11	
2.2 Formalisation and representation	12	
2.3 'Fairness at Work' and the right to accompaniment	12	
2.4 Statutory procedures – formalisation and conflict	14	
2.5 The Gibbons Review – a return to voluntarism?	15	
3. DISCIPLINE, GRIEVANCE AND REPRESENTATION – THE EVIDENCE	17	
3.1 Explaining rates of disciplinary sanctions and dismissals	17	
3.2 Grievance, discipline and employment tribunal applications	19	
3.3 Accompaniment, representation and disciplinary outcomes	20	
4. METHODOLOGY AND RESEARCH DESIGN	25	
5. FINDINGS	28	
5.1 Operation of disciplinary and grievance processes	28	
5.2 The role of companions and employee representatives	36	
5.3 The impact of accompaniment and representation	46	
5.4 Factors that shape effective representation in workplace discipline and grievance	51	
6. CONCLUSIONS	59	
REFERENCES	62	
LIST OF TABLES		
Table 3.1	Percentage of workplaces with formal grievance procedures offering employees the statutory right to accompaniment	21
Table 3.2	Percentage of workplaces with formal disciplinary procedures offering employees the statutory right to accompaniment	22
Table 4.1	Breakdown of sample	26

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EXECUTIVE SUMMARY

This report describes the findings of a pilot study which explored the impact of the accompaniment and representation of employees within disciplinary and grievance processes. The research focussed on eight case studies of employing organisations and was conducted in April and May 2008. The sample was made up of: two large private sector unionised organisations; two medium-sized non unionised organisations; two small non-unionised organisations; and two large public sector organisations which both recognised trade unions. Case studies involved interviews with Human Resource managers, operational managers, trade union representatives and employee companions.

The recent Gibbons Review (Gibbons, 2007) and the publication of the Employment Bill 2007-8 have concentrated attention on ways in which employment disputes can be resolved in the workplace. However, one aspect that has received relatively little attention is the impact of accompaniment and representation within both formal and informal aspects of disciplinary and grievance processes. Therefore, this study seeks to remedy this omission by examining whether representation and accompaniment can help to resolve disputes and moderate disciplinary outcomes.

Operation of disciplinary and grievance processes

- In all the case study organisations formal written disciplinary and grievance policies were well established. Provisions regarding accompaniment and representation at formal hearings met, and in many respects exceeded, the provisions of existing legislation and Acas guidance.
- In smaller, non-unionised organisations the detail of the right to accompaniment was not always explained clearly to companions. In particular it was not always made plain that they were entitled to ask questions and address the hearing. Companions rarely received either documentation or details of the case beforehand.
- Respondents placed significant emphasis on the importance of informal processes in resolving disciplinary and grievance issues. While it was acknowledged that certain matters had to be dealt with through procedure, informal resolution was seen as crucial.
- There was evidence of a drift towards a more process-driven approach to handling discipline and grievance. A number of explanations were given for this. These included: the threat of legal implications and particular employment tribunal applications; fear of internal criticism; inexperienced line management; and the changing nature of the HR function. High-trust relationships between line managers, employee representatives and HR managers were critical in underpinning informal processes.

Role of the companion and representative

- Within the organisations in the sample there were clear differences in the roles played by non-union companions, trade union representatives in non-union environments and trade union representatives within heavily unionised settings. Most non-union companions had little or no role within informal processes. Respondents reported that in most formal hearings companions were solely used as a source of support and to observe proceedings.
- Non-union companions were perceived by management respondents to lack both the knowledge and confidence to challenge management within disciplinary and grievance hearings. Companions that were interviewed voiced concerns as to the implications of being either associated with a dispute or seen as a 'troublemaker'.
- Trade union representatives in the four unionised environments were seen by managers as playing a positive role in informal process of dispute resolution. They provided an early warning of potential problems, a channel of communication between manager and employee and were also seen to help monitor members involved in disciplinary or grievance issues. In contrast, in the four non-unionised organisations, informal contact between union officers and employers was rare.
- Within formal hearings, the main role of the union representative was advocacy. In the unionised organisations, managers found that most union representatives helped to ensure that all issues were explored and fair decisions reached. Furthermore, union representatives were able to manage the expectations of the member, which was seen as useful in avoiding unnecessary confrontation. Union representatives were generally perceived to be well-trained and knowledgeable in terms of legal and procedural issues.
- In the non-unionised companies within the sample, managers largely perceived the role of union representatives to be confrontational and obstructive. Managers found the level of legal knowledge of trade union officers challenging. Trade union representatives suggested that negative preconceptions on the part of non-union employers made constructive approaches to discipline problematic.

Impact of companions and representatives on disciplinary outcomes

- In limited circumstances, it appeared that non-union companions could affect outcomes, however this seemed to be conditional on the companion having the knowledge and confidence to advise her/his colleague and actively participate in the hearing. In this study, most companions had little impact in either informal or formal stages of the process. In the larger organisations that recognised trade unions, non-union companions tended to be seen as playing a negative role in formal hearings.

- Respondents within unionised settings in our sample were clear that effective trade union representation within informal stages allowed for the early identification of problems and informal approaches to resolve them. This prevented certain issues from escalating and helped avoid formal disciplinary action and dismissals.
- Where they were recognised, trade union representatives were found to have an impact on management consideration of disciplinary and grievance cases. Experienced and articulate representatives were able to put procedural and legal arguments that individual employees and most companions would have little knowledge of. Moreover, constructive and realistic approaches were considered more likely to generate lenient decisions. Managers found a minority of union representatives to be overly confrontational which was not seen to help moderate outcomes.
- Trade union representation in the smaller and non-unionised organisations within our sample could impact upon disciplinary and grievance decisions. However, hearings in these environments were often adversarial. The managers were suspicious of union motives and consequently sought refuge in a more formal approach.

Effective representation and accompaniment – key factors

- High-trust relationships between representatives and managers were crucial. Where this was evident, there was a constructive approach to discipline and grievance, widely utilising informal processes of resolution. Where it was absent, managers tended to fall back on formality and procedure to ensure legal compliance.
- There was evidence of more effective representation and dispute resolution within the larger workplaces in our sample, however, this seemed to be related to the existence of robust representational structures and good management-union relations as opposed to the size or nature of the organisation itself.
- Experience, training and legal knowledge were seen to be pre-requisites for effective representation. This not only allowed representatives and companions to get the best result for the employee but also helped to facilitate constructive approaches to grievance and disciplinary issues. Untrained and inexperienced companions and representatives were seen as, at best, irrelevant and, at worst, as unhelpful to both employee and the functioning of the process.

Implications for policy and research

- Effective employee representation, underpinned by high-trust relations appears to be critical in minimising disciplinary sanctions and dismissals. There is a need for greater emphasis on the positive role played by employee representatives and companions within government policy, advice and guidance.

- As previously suggested by Acas, in its response to the Government's review of dispute resolution, there is a pressing need to develop and enhance initiatives to improve skills and competencies amongst employee representatives and line managers in handling employee grievances and disciplinary issues.
- The revised Acas Code of Practice on Discipline and Grievance, and its accompanying non-statutory guidance needs to reflect, reinforce, and clarify the role played by employee representatives and companions within both formal and informal processes of dispute resolution.
- For smaller organisations, disciplinary and grievance situations can be daunting. Particular attention is needed to establish ways in which accompaniment and representation can be made more effective within smaller and non-unionised organisations.
- A detailed programme of research is required to establish whether the themes uncovered within this study are reflective of UK workplaces as a whole. In particular there is a need to examine dispute resolution within smaller unionised establishments and larger non-unionised workplaces with alternative systems of employee representation.

1. INTRODUCTION

In recent years the nexus of industrial conflict has been subject to a radical shift from collective disputes to individual disciplinary and grievance issues. As days lost through strike action have dwindled there has been a substantial growth in the number of claims to employment tribunals. In 2005/6, the annual cost to the government of operating the dispute resolution system in the UK was estimated to be £120mn while the annual cost to employers of individual workplace disputes was estimated at £290mn (Gibbons, 2007:7).

Consequently, increased focus has been placed upon procedures used for handling discipline and grievance within UK workplaces. A key aim of government employment policy has been to improve the effectiveness of such procedures and provide both employers and employees with strong incentives to resolve disputes in-house. This has centered on two key measures, designed to strengthen processes of dispute resolution, buttress individual employment rights and contain the growth of employment tribunal applications.

Firstly, the right to accompaniment (by a work colleague or trade union representative) within grievance and disciplinary hearings was introduced in September 2000 as part of the Employment Relations Act 1999. It was hoped that by providing access to workplace representatives, employees would be treated more fairly within grievance and disciplinary processes. Moreover, effective representation was seen as crucial in reducing workplace conflict and facilitating the successful resolution of disputes between employers and employees, so reducing the growing burden being placed on the employment tribunal system. Secondly the Employment Act 2002 (Dispute Resolution) Regulations introduced minimum statutory procedures for the handling of grievances and dismissals.

However, hopes that procedural formalisation would stem the rising tide of employment tribunal applications have proved illusory. In this context the Gibbons Review, commissioned by the government to examine the operation of dispute resolution in the UK, marked a sea change in thinking, concluding that over formalisation of workplace procedure was inhibiting, rather than facilitating, the resolution of disciplinary and grievance issues. Not surprisingly, Gibbons recommended the abolition of statutory dismissal and grievance procedures and a renewed emphasis of workplace mediation and conciliation. This recommendation has already been enacted in the Employment Bill 2007/8 and reflected in a new draft Acas Code of Practice on Disciplinary Procedures.

Interestingly, there has been little discussion as to the role of companions and employee representatives within workplace dispute resolution. Indeed it is barely mentioned by Gibbons. In theory, accompaniment promotes both equity and efficiency. Individuals receive much-needed support and advice at a difficult time, workplaces are deterred from making excessively harsh decisions and the involvement of a companion provides employers with a point of contact that encourages the resolution of workplace disputes. However, to date, there is limited evidence as to whether the right to accompaniment is achieving these goals.

The Workplace Employment Relations Survey 2004 (WERS2004) provided, for the first time, detailed data on the role of companions within grievance and disciplinary processes in British workplaces and measured the extent to which the statutory right to accompaniment was being adhered to. However, analysis of this data (Saundry and Antcliff, 2006) suggested that not only was the application of the right uneven but there was little evidence that it was a significant factor in reducing rates of dismissal or disciplinary sanctions (see also Kersley et al., 2006). While this analysis pointed to the broad significance of trade union density and procedural formality in shaping disciplinary outcomes, it concluded that detailed qualitative analysis was needed to explore the process and patterns of workplace representation which constitute the reality of employment practice within the workplace (Dickens et al., 2005).

1.1 Aims and objectives

This report seeks to begin to fill this important gap by examining findings from a pilot research project based around eight organisational case studies. Interviews were conducted with HR specialists, operational managers, employee representatives and companions to provide a broad picture as to how discipline and grievance is handled in a variety of different settings. Drawing on this data this report:

- reviews the existing evidence base in relation to workplace representation and the operation of grievance and disciplinary processes;
- examines the views of key actors regarding the operation of disciplinary and grievance policies and procedures;
- assesses the level of knowledge and implementation amongst key actors regarding the statutory right to accompaniment under the Employment Relations Act 1999;
- investigates the role of companions and employee representatives prior to formal grievance and disciplinary proceedings;
- explores the perceptions of companions and employee representatives as to their role within grievance and disciplinary hearings;
- examines the views of participants as to the impact of accompaniment and representation within grievance and disciplinary hearings.

The report is organised as follows: firstly, we trace the development of policy in relation to workplace grievance and discipline; secondly, the existing academic research in this area is reviewed; the research methods used in the project are then briefly explained; we then set out the findings of the project before drawing conclusions and outlining the implications for policy and future research.

2. DISCIPLINE AND GRIEVANCE – THE LEGAL AND POLICY CONTEXT

2.1 Historical development of the law relating to discipline and grievance

Until relatively recently, there was no specific legislation governing the operation of workplace discipline and grievance in the UK. Instead, the handling of such issues was shaped by the framework of unfair dismissal law introduced in the wake of the 1968 report of the Royal Commission on Trade Unions and Workplaces' Associations (the 'Donovan Report'). At that time, individual disciplinary issues were a significant trigger for collective industrial action. Donovan argued for the introduction of an 'accessible, speedy, informal and inexpensive' system of tribunals that could rule on workplace disputes and remove discipline from the ambit of collective bargaining. To this extent, the application of procedure was seen as a way of institutionalising industrial conflict. Consequently the introduction of a right not to be unfairly dismissed and an expansion of the jurisdiction of industrial tribunals to consider resulting claims were incorporated in the Labour government's White Paper 'In Place of Strife' and subsequently introduced by Edward Heath's Conservative administration in the Industrial Relations Act 1971. Although this was later repealed in 1974 by the incoming Labour government, the provisions relating to unfair dismissal and Industrial Tribunals were immediately retained within the Trade Union and Labour Relations Act 1974 (and subsequently consolidated in the Employment Rights Act 1996).

Under the Employment Protection Act 1975, employers were obliged to include a note in the written particulars of terms of employment of their employees, which set out details of any workplace disciplinary procedures. In addition the note also had to specify how and to whom a grievance or an appeal against a disciplinary decision could be lodged. However, the legislation did not stipulate the scope, extent or operation of such procedures. Moreover, those employers who did not have written disciplinary and/or grievance procedures were not under any obligation to introduce them.

In 1977 the Acas Code of Practice on 'Disciplinary Practice and Procedures' was introduced to provide guidance for employers and employees. This code, while not legally binding, defined good practice. Perhaps more importantly, it was used by Industrial Tribunals as a guide as to what could be expected of a reasonable employer. Paragraph 11 summed up the essence of procedural fairness as follows:

'Before a decision is made or imposed the individual should be interviewed and given the opportunity to state his or her case and should be advised of any rights under the procedure, including the right to be accompanied'.

Over time, failure to allow accompaniment at disciplinary proceedings came to be seen as a breach of Natural Justice and hence a fatal procedural flaw liable to render consequent dismissals unfair. Yet, despite this there was neither a statutory right to accompaniment nor any legislative provisions compelling workplaces to adopt formal written disciplinary and grievance procedures. Indeed after the introduction of the Employment Act 1989, firms with fewer than twenty employees no longer had to provide details of disciplinary and grievance

procedures within written statements of terms and conditions of employment, as outlined above.

2.2 Formalisation and representation

By the time of the introduction of the Employment Rights Act 1996, formal procedures were commonplace. In 1990, 90% of workplaces employing twenty-five employees or more reported having a formal disciplinary procedure (Millward et al., 1992). Interestingly this was not confined to sectors of industry with high levels of trade union organisation. In fact more than eight out of every ten establishments that did not recognise trade unions had a formal disciplinary procedure. There were little data on much smaller firms, however, it was thought that practice here was much more informal (Evans et al., 1985).

There are a number of explanations for the increased use of written disciplinary and grievance procedures. However, the introduction of unfair dismissal and discrimination legislation and the consequent threat of defending employment tribunal applications were argued to have provided employers with a significant impetus to adopt more formal processes (Edwards et al., 2004). Nonetheless, the greater use of formal procedure failed to halt the rapid increase in employment tribunal applications from 1988 onwards, with the rate more than trebling between 1988 and 1996 (Burgess et. al, 2001).

In terms of representation, the 1998 Workplace Employment Relations Survey (Cully et al., 1999) suggested that accompaniment at disciplinary hearings was almost always provided for within written formal procedures. However WERS98 provided no data on the nature or scope of accompaniment offered.

2.3 'Fairness at Work' and the right to accompaniment

In this context, the Labour government introduced its 'Fairness at Work' White Paper (Department of Trade and Industry, 1998). This outlined the aim of the government to create 'the most lightly regulated labour market of any leading economy of the world' while at the same time providing a 'minimum infrastructure of decency and fairness'. Importantly, the focus was placed firmly on extending 'the rights of the individual...as a matter of choice'.

While stressing the right of individuals to defend or advance their interests at work, irrespective of trade union membership or recognition, the White Paper acknowledged that employees may need assistance in representing those interests. The Acas Code of Practice on Disciplinary Practice and Procedures had long recommended that employees should have the option of being accompanied by a trade union representative or fellow employee of their choice. The White Paper therefore proposed that this recommendation should be made a statutory right during grievance and disciplinary procedures.

Consequently section 10 of the Employment Relations Act 1999 established a right to accompaniment at disciplinary and grievance hearings. This provision took effect on 4th September 2000. For the purpose of the legislation, a disciplinary hearing was defined as a meeting that could result in:

- a formal warning being issued to a worker;
- the taking of some other disciplinary action (such as dismissal, demotion, suspension without pay) or other action; or
- the confirmation of a warning or some other disciplinary action (such as an appeal hearing).

Importantly, the right to accompaniment did not extend to informal discussions or counselling over a disciplinary issue. Meetings held to investigate a disciplinary issue were also excluded from the definition of disciplinary hearing. Grievance hearings, for the purposes of the legislation, were defined as hearings that concern 'the performance of a duty by an employer in relation to a worker' (s.13(5)).

Requests for accompaniment had to be 'reasonable' and the companion could be either a fellow worker or a full-time or lay trade union official, irrespective of whether that trade union was recognised by the employer. The right did not extend to partners, relatives, spouses or legal representatives although employers were free to allow accompaniment by such parties. Companions were entitled to take a reasonable amount of paid time off to carry out their responsibilities. When accompanying a worker at a grievance or disciplinary hearing, the companion was permitted to confer with the worker and to address the hearing, however, the legislation did not provide a right for a companion to either answer questions or attend a hearing on the worker's behalf.

In 2003, the government completed a review of the Employment Relations Act 1999 (Department of Trade and Industry, 2003) including the right to accompaniment. In general, the review claimed that the Act had been a 'resounding success'. The review concluded that the right to accompaniment had operated 'smoothly' since its introduction. Differing interpretations over the scope of accompaniment caused most controversy. In particular trade unions called for a widening of the role of the companion. They claimed that some employers prevented the companion from making any comments or asking questions on behalf of employees. Consequently, the government proposed to clarify the scope of accompaniment. These proposals were formalised in s. 37 of the Employment Relations Act 2004 so that the companion was permitted to address the hearing in order to:

- put the worker's case;
- sum up that case;
- respond on the worker's behalf to any view expressed at the hearing.

But, the employer was not required to permit the companion to:

- answer questions on behalf of the worker;
- address the hearing, if the worker does not want the companion to do so; or
- use his or her powers... 'in a way that prevents the employer from explaining his case or prevents any other person at the hearing from making his contribution to it'.

Furthermore, the amendments to the Employment Relations Act 1999 ensured that the right was applied to all workplaces, including those that did not operate disciplinary or grievance procedures.

2.4 Statutory procedures – formalisation and conflict

The most significant recent legal development in this area was the introduction, in October 2004, of statutory dismissal and grievance procedures under the Employment Act 2002. The Employment Act 2002 (Dispute Resolution) Regulations set out for the first time minimum three-step procedures that all workplaces (irrespective of size) had to follow when dealing with dismissals and employee grievances. They came into force on 1 October 2004.

If an employer dismissed an employee without following the necessary three steps, the dismissal was deemed to be automatically unfair. In addition if either the employer or employee failed to follow the minimum procedure, compensation in the event of a finding of unfair dismissal could be increased or reduced by between ten and fifty per cent. This was designed to not only ensure legal compliance on the part of employer, but also to give employees a strong incentive to exhaust internal appeal procedures before making a tribunal claim.

Furthermore, in cases of discrimination or unfair constructive dismissal, the Regulations specified that an employee must wait 28 days after having submitted their grievance in writing before making any application to an employment tribunal. Effectively this meant that in most cases an employee could not make a tribunal claim of this type without first submitting a written grievance. If either the employer or the employee failed to follow the minimum three-steps, including an appeal, the tribunal had the power to increase or reduce any subsequent compensation by between ten and fifty per cent.

It is important to note that the legislation did not compel workplaces to have a written procedure. It simply set out mandatory steps that had to be followed. Findings from WERS2004 (which overlapped with the introduction of the regulations) confirmed that while formal procedures were widespread in larger workplaces, in small workplaces a significant minority still had no formal grievance (37%) or disciplinary procedure (31%). An even larger proportion of workplaces did not implement the three steps as outlined in the dispute resolution regulations. This problem was particularly acute in the case of micro firms with less than ten employees (Forth et al., 2006).

The regulations were clearly aimed at reducing the number of employment tribunal claims by forcing employers and, most importantly, employees to exhaust internal procedures before resorting to an employment tribunal claim (Department of Trade and Industry, 2001). Between 2003/4 and 2005/6 the number of single employment tribunal claims fell from 65,364 to 52,000. However whether this was due to more effective workplace dispute resolution, or simply the increased difficulty of making a claim, is questionable (Suff et al., 2006). Hepple and Morris (2002) suggested that the impact of the procedural changes introduced under the Employment Act 2002 downgraded rather than enhanced procedural fairness. They argued that the statutory procedures fell well short of best practice reflected by the Acas Code of Practice. Furthermore, as long as the employer followed the statutory procedure they could escape a finding of unfair dismissal on the grounds that procedural defects would have made 'no difference' to the decision to dismiss. Even so, employers complained that the regulations increased both administration and the incidence of workplace disputes (Gibbons, 2007). Indeed in 2006/7, single employment tribunal claims rose by 3% while the number of all claims (including those with multiple claimants) increased by 15% (Employment Tribunal Service, 2007).

2.5 The Gibbons Review – a return to voluntarism?

In response to such criticisms, the government commissioned the Gibbons Review to 'identify options for simplifying and improving all aspects of employment dispute resolution' (Gibbons, 2007: 7). Gibbons concluded that the statutory procedures led to employers adopting formal processes rather than seeking informal resolution of disputes (see also Chartered Institute of Personnel and Development, 2007). Moreover, both employers and employees sought advice from third parties at an early stage, encouraging defensive attitudes and making it increasingly difficult for parties to avoid legal proceedings. For small employers the emphasis on procedure and written communication was 'counter cultural' and only served to exacerbate conflict and escalate disputes. Consequently, the Review recommended the repeal of the statutory dispute resolution procedures, the production of 'clear, simple, non prescriptive guidelines' for employers and employees in relation to grievances, discipline and dismissal, and the promotion of workplace mediation. Significantly there was no discussion within the review of either the right to accompaniment or the role of employee representatives within workplace dispute resolution save for an exhortation to trade unions and employee organisations to support and promote mediation.

In responding to Gibbons the government (Department of Trade and Industry, 2007) argued that the central theme of legislation in this area was to 'encourage employees and employers to resolve disputes in the workplace' and initiated consultations as to how dispute resolution could be facilitated. In particular it invited responses on the possible repeal of the dispute resolution regulations. Employers' organisations broadly supported the conclusions of the Gibbons Review and the call for the repeal of statutory dismissal and grievance procedures. The TUC argued that statutory procedures had provided important safeguards for employees, particularly those in smaller organisations (TUC, 2007). Furthermore it suggested that if the dispute resolution regulations were to be repealed, it was important to strengthen the role of trade unions in resolving employment disputes through: removing the small firms' exclusion in the statutory trade union recognition legislation; and providing a statutory right of representation (as opposed to accompaniment) within grievance and disciplinary proceedings. Acas, responding to the consultation, also stressed the key role played by workplace representatives in avoiding and resolving workplace disputes and highlighted the need for improved training for both union representatives and managers.

Following consultations (BERR, 2008a) the Government accepted the main recommendations of the Gibbons Review and, in the Employment Bill 2007-8, proposed the repeal of the statutory dispute resolution procedures. In addition it concluded that related changes to the law regarding procedural unfairness in dismissal cases should revert to that established by *Polkey v AE Dayton Services*, whereby failure to follow an internal disciplinary procedure would render a dismissal unfair even if it could be shown that it would have made no difference to the outcome. The government also responded to calls for a new 'short, non-prescriptive' statutory Acas Code of Practice on Discipline and Grievance backed by more detailed non-statutory guidance. Importantly, the government proposed to increase the influence of the Code by allowing tribunals to adjust tribunal awards by up to 25% if either party acts unreasonably in not complying with its provisions. More broadly, the government signaled an intention to work with representative organisations in promoting the early resolution of disputes.

Mirroring the Review, the government's response to the consultations made no mention of the right to accompaniment or the role of employee representatives within workplace processes of dispute resolution. Neither the proposals made by the TUC regarding strengthening the role of representation nor the comments of Acas in relation to importance of suitably trained workplace representatives were mentioned.

The Gibbons Review and the proposed repeal of the Dispute Resolution Regulations arguably mark a return to a more voluntaristic approach to workplace discipline and grievance. In particular, it represents an admission that the juridification of workplace procedures undermines important informal processes that have traditionally facilitated the effective handling of individual workplace conflict. However, despite the implied promotion of more informal paths to resolving disputes, the role of employee representatives within such informal processes has been almost completely overlooked within the policy debate.

3. DISCIPLINE, GRIEVANCE AND REPRESENTATION – THE EVIDENCE

This section examines the existing evidence base in relation to workplace discipline and grievance. In particular it explores literature that has attempted to identify the factors that shape the disciplinary profile of workplaces and consequent outcomes. Firstly we review a range of research that has sought to explain variations in rates of disciplinary sanctions and dismissals across GB workplaces. Secondly we look at the factors that influence the extent to which employee grievances and disciplinary decisions lead to employment tribunal applications. Finally we discuss the impact of accompaniment and representation on workplace discipline and grievance.

3.1 Explaining rates of disciplinary sanctions and dismissals

A number of empirical studies have used large-scale survey data in order to identify the key factors that influence rates of disciplinary sanctions and dismissals within GB workplaces. Overall a reasonably consistent picture emerges in relation to the impact of workforce composition. Firstly, a number of authors have found a significant inverse relationship between the proportion of women employed at a workplace and the rate of disciplinary sanctions and dismissals, possibly suggesting a high level of compliance to workplace rules and disciplinary norms (Knight and Latreille, 2000; Saundry and Antcliff, 2006). Indeed, workplaces with no female employees have particularly high levels of conflict (Blackburn and Hart, 2002). An additional factor may be the gender of managers. Recent exploratory research in Canada has found that female managers were slightly more likely than their male counterparts to be lenient in the disciplinary sanctions that they apply (Cole, 2008: 114).

Secondly, ethnicity is argued to be a powerful predictor of the disciplinary profile of GB workplaces. Edwards' (1995) analysis of WIRS1990 found that rates of dismissal were higher in firms that employed a higher proportion of employees from minority ethnic groups. More recent analysis of WERS98 and WERS2004 found a strong and positive relationship between the proportion of 'non-white' employees and rates of disciplinary sanctions and dismissals (Knight and Latreille, 2000; Saundry and Antcliff, 2006). This fails to take into account the increasing presence of 'white' employees who are members of minority ethnic groups. Nonetheless these findings suggest that discriminatory behaviour from fellow workers and employers and also structural occupational disadvantage (Clark and Drinkwater, 2007) have some influence on workplace discipline. A further explanation may lie in the fact that employees from minority ethnic groups have also been found to have a lower level of awareness of employment rights when compared with their white British counterparts (Casebourne et al., 2006). This may make such employees reluctant to file formal grievances and may limit their ability to challenge disciplinary action.

Thirdly, there appears to be a strong association between age and rates of disciplinary rates. Knight and Latreille (2000) found that workplaces in which there was a higher proportion of young people were more likely to have higher rates of both disciplinary sanctions and dismissals. They argued that this reflected the lower costs associated with dismissing younger employees. Saundry and

Antcliff (2006) similarly found that workplaces with higher proportions of workers over the age of 51 were less likely to discipline and dismiss their employees.

Finally, analyses of WIRS and WERS data have shown a clear link between occupation and disciplinary rates. Edwards (1995) discovered that the proportion of skilled employees was negatively related to dismissal and discipline rates (see also Deaton, 1984). Looking at the association from the other side both Knight and Latreille (2000) and Saundry and Antcliff (2006) found that the proportion of unskilled employees was positively associated with rates of disciplinary sanctions and dismissals. This may reflect the fact that those in professional occupations and management grades have a relatively high awareness of legislation in relation to discipline and grievance (Casebourne et al., 2006) and hence may be able to contest disciplinary and grievance decisions more effectively.

Workplace characteristics have also been found to be powerful predictors of rates of discipline and dismissal. It might be expected that in smaller workplaces, with a more informal approach to handling individual disputes, disciplinary sanctions would be more freely administered. However, the evidence runs counter to this. In general, as workplace size increases so do rates of disciplinary sanctions and dismissals (Edwards, 1995; Knight and Latreille, 2000; Saundry and Antcliff, 2006). This could suggest that the personal nature of employment relations in small workplaces acts as a barrier to disciplinary sanctions. Evidence from small and medium-sized businesses points to a preference for an informal approach in dealing with individual disputes (Harris et al., 2008). Forth et al.'s analysis of WERS2004 (2006) found that overall disciplinary sanctions are less commonly applied in small businesses. Interestingly, however, they are just as likely to give employees a formal verbal warning as their large counterparts but much less likely to impose more serious sanctions. This may reflect a preference for having 'a quiet word' with employees (Earnshaw et al., 2001).

In contrast, in larger workplaces a more formal approach may preclude informal processes of dispute resolution, resulting in a greater use of formal sanctions. For example, Saundry and Antcliff's (2006) recent analysis of WERS2004 found little evidence that greater formality reduced the likelihood of disciplinary sanctions and dismissals. This suggests tensions between informality and the perceived need to formalise issues such as discipline (Earnshaw et al., 2001). In short, managers may be tied in to dealing with issues in a formal manner that could be more effectively dealt with informally. Once employees are 'in procedure', it may be very difficult for them to escape. This is consistent with Goodman et al.'s (1998) qualitative findings that suggested that in many instances the initiation of disciplinary action was a precursor to dismissal whereby workplaces used procedure to prompt resignation and to provide 'cover' in the event of a claim to an employment tribunal. Moreover there is evidence that even amongst smaller firms the prospect of litigation is now leading to the earlier use of formal procedure for dealing with disciplinary issues (Harris et al., 2008).

However, it cannot be assumed that an informal approach is without potential problems. Informality enables managers to be flexible in how they respond to individual disciplinary issues and in the sanctions that are applied. While this may assist dispute resolution it can lead to a lack of consistency that can damage the perception of procedural fairness (Cole, 2008). Informal solutions also raise issues of power that may go unrecognised in relation to how the issues are framed and recorded and in terms of access to representation and advice on the

part of the employee. As research in the U.S. has demonstrated, in relation to grievances access to and confidence in informal solutions may also differ between male and female employees due in part to women's lack of insider status in male networks (Hoffman, 2005).

3.2 Grievance, discipline and employment tribunal applications

The eventual outcome of an employee grievance and/or an employer's decision to dismiss may be an application to an employment tribunal. Indeed, as we noted above the spectre of appearing before an employment tribunal has been one reason for the increased use of formal grievance and disciplinary procedures in GB workplaces. However, over the past 25 years there has been a significant increase in employment tribunal applications. Cully et al. (1998) reported that the rate (per thousand employees) of ET claims among firms with 25 or more employees increased by 73% between 1984 and 1998. This rate of applications has been sustained with Kersley et al. (2006) reporting that in 2004, there were on average 2.2 claims per thousand employees (across all workplaces).

Goodman et al. (1998) suggested a number of explanations for the growth in tribunal applications during the 1990s: increasing awareness of employment rights; more punitive disciplinary regimes; and the erosion of trade union organisation. But they found it difficult to isolate an explanation for differing incidences of unfair dismissal claims, reflecting the complexity of the subject. One unique factor would seem to be the perceptions of potential claimants as to possible success. Burgess et al. (2001) found that a powerful explanatory variable was the lagged win rate. In short, if employees saw other workers winning significant compensation they would be more likely to make a claim.

Overall, Burgess et al. (2001) argued that compositional factors were the most powerful drivers of increased applications between 1972 and 1997. However, the impact of workforce composition is not straightforward. Not surprisingly, the vast majority (91 per cent) of sex discrimination cases are brought by women (Hayward et al., 2004). Therefore increased workforce diversity and the introduction of discrimination legislation through the 1970s could be argued to have triggered an increase in employment tribunal applications. However when one looks at applications as a whole, it would seem that women are less likely to make claims. Blackburn and Hart (2002) found that where females formed the majority of the workforce the likelihood of legal disputes and employment tribunal cases fell sharply. Analysis of the 2003 survey of employment tribunal applications (SETA) also found that approximately three-fifths (61 per cent) of tribunal applicants were men (compared to 51 per cent in the workforce as a whole) (Hayward et al., 2004).

In terms of ethnicity, Knight and Latreille (2000) identified a positive relationship between the proportion of 'non-white' employees and tribunal applications. More recently, Hayward et al. (2004) found that non-white applicants were slightly over-represented within tribunal applications as a whole. This is interesting given low levels of awareness of employment rights amongst this group of workers (Casebourne et al., 2006). SETA also showed that younger, single people would seem to be less likely to apply as do those employed in part-time and temporary employment (Hayward et al., 2004). This might suggest that those who are less

mobile and perhaps have less to lose from dismissal are less likely to think that legal action is worthwhile.

Workplace characteristics have also been seen to be important in accounting for variations in the rate of employment tribunal applications. Employment tribunal cases appear to come disproportionately from the private sector (Hayward et al., 2004; Kersley et al., 2006). This may be explained by low rates of dismissals within public sector organisations. However, there does not seem to be a simple association between workplace size and the incidence of tribunal applications. While Kersley et al. (ibid.) found that rates appeared to be generally lower in large workplaces, the difference in rates between large and small workplaces was not significant. Data from SETA (Hayward et al., 2004) and also Forth et al.'s (2006) analysis of WERS2004 provides a slightly more nuanced account in that it would seem that rates of employment tribunal applications were highest in medium-sized workplaces and lowest in small workplaces. This may reflect the fact while large workplaces are more likely to have higher rates of disciplinary sanctions and dismissals they are more likely to have robust procedures and specialist HR/personnel managers providing them with greater protection from litigation. In small workplaces, employers are more likely to use informal processes and are less likely to dismiss employees. However, medium-sized workplaces may fall between these two extremes – they may neither have the close personal employment relationships that promote informal resolution nor the procedural and organisational resilience that larger workplaces enjoy.

In light of this, it is interesting to note that previous analysis has found little relationship between procedural variables and rates of employment tribunal applications (Burgess et al., 2001; Knight and Latreille, 2000; Saundry and Antcliff, 2006). It would certainly seem to be the case that the existence of formal procedure does not necessarily preclude litigation. In fact, Kersley et al. (2006) found that workplaces with a formal disciplinary procedure had rates of tribunal applications more than twice those of workplaces with no procedure. This could be explained by employers introducing disciplinary procedures after facing employment tribunal action (Earnshaw et al., 1998). However an alternative explanation may be linked to the failure of employers to properly implement their own grievance and disciplinary procedures. Procedural flaws are a common basis for unfair dismissal and discrimination claims (Hayward et al., 2004). Detailed research of race discrimination cases heard by employment tribunals between May 2005 and February 2006 (Aston et al, 2006) highlighted that often the origins of the case lay in the claimant's perception of having been treated unfairly on a number of occasions in respect of their employer's internal procedures, including those specifically related to grievance.

3.3 Accompaniment, representation and disciplinary outcomes

The erosion of workplace trade union organisation has also been cited as major factor behind the growth employment tribunal applications (Burgess et al., 2001; Goodman et al., 2001). In essence, workers, unable to seek the support of trade unions in resolving workplace disputes, are forced to resort to individual litigation. The role of employee representation in providing a 'voice' mechanism allowing employees to air grievances has long been seen as a way of preventing unnecessary 'exit' from organisations (Freeman and Medoff, 1984). From this

perspective, structures of trade union representation provide a means through which disputes can be resolved and quits and dismissals minimised.

The most detailed examination (to date) of the extent and scope of accompaniment and representation within disciplinary and grievance procedures was conducted by Saundry and Antcliff (2006) on behalf of the Department of Trade and Industry. Their analysis of data from WERS2004 suggested that the application of the right to accompaniment was uneven and haphazard confirming earlier analysis of SETA2003 (Hayward et al., 2004).

Saundry and Antcliff (2006) found that 42 per cent of workplaces failed to meet at least one element of the statutory requirements regarding accompaniment at grievance hearings. Even when one examined only those workplaces with a formal grievance procedure, nearly one third (36 per cent) failed to comply with the legislation (see table 3.1 below). Similarly, 39 per cent of all workplaces failed to meet at least one of the legal requirements for accompaniment at disciplinary hearings. Table 3.2 shows that among those workplaces where employees were always given the opportunity of a formal disciplinary hearing and those with formal disciplinary procedures, 35 per cent failed to offer employees their full statutory rights to accompaniment.

WERS2004 also provided data on the extent to which other aspects of the statutory right to accompaniment in grievance and disciplinary procedures were being observed in GB workplaces. These included the right of an employee to confer with their companion, the right of the companion to ask and answer questions on behalf of the employee and the right of the employee to appeal against any decisions.

Table 3.1 Percentage of workplaces with formal grievance procedures offering employees the statutory right to accompaniment

Does establishment fulfil legal requirements re: accompaniment?	Is there a formal procedure for dealing with individual grievances raised by any employee at this workplace?
-----------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------

	Yes
No	36.1
Yes	63.9
Total	100 %

Source: WERS2004. Base: All workplaces where grievance hearings are held. Figures are weighted and based on responses from 1182 managers.

(Reproduced from Saundry and Antcliff, 2006)

Table 3.2 Percentage of workplaces with formal disciplinary procedures offering employees the statutory right to accompaniment

Does establishment fulfil legal requirements re: accompaniment? Is there a formal procedure for dealing with discipline and dismissals?

	Yes	No
No	35.3 %	64.3
Yes	64.7 %	35.7
Total	100 %	100 %

Source: WERS2004. Base: All workplaces where disciplinary hearings are held. Figures are weighted and based on responses from 2228 managers.

(Reproduced from Saundry and Antcliff, 2006)

Saundry and Antcliff (ibid.) found that application of the law in respect of individual grievance hearings and disciplinary hearings was patchy. Around one in five workplaces did not allow companions to ask questions on behalf of the employee, something they were clearly allowed to do under the Employment Relations Act 1999. At the same time approximately half allowed companions to answer questions on behalf of the employee, a practice which the employer is not required to permit under the legislation (see also Kersley et al., 2006 for a thorough analysis of this data).

Overall, WERS2004 suggested a degree of confusion among managers about statutory rights to accompaniment, while previous research (Casebourne et. al., 2006) has highlighted an equal misunderstanding on the part of the employee. Given the uncertainty on both sides of the employment relationship, it is perhaps not surprising that application of the statutory right to accompaniment was inconsistent.

Furthermore, Saundry and Antcliff (2006) found that observation of the right to accompaniment at disciplinary hearings, in itself, did not moderate disciplinary outcomes. They argued that by the time the right was effective, when the employee is invited to a disciplinary hearing, the chances of avoiding any disciplinary sanction would be slim. Instead, they argued that representation might be most effective prior to the onset of formal proceedings. They did find that workplaces that observed the right to accompaniment at grievance hearings were likely to experience lower rates of employment tribunal applications.

However, Saundry and Antcliff (ibid.) found strong evidence that pointed to the importance of employee representation. In short where union density was higher, workers were less likely to be disciplined or dismissed. This confirms earlier research that has consistently highlighted the influence of trade union presence in determining rates of dismissal and disciplinary sanctions (Millward et al., 1992; Knight and Latreille, 2000). A cynical interpretation of this result would be that it simply reflects workplace power relations. Managers in unionised establishments may be deterred from taking disciplinary action against workplaces by the threat of worsening employee relations, retaliation or legal challenges. In contrast it could be argued that strong and effective trade unions can facilitate the day-to-day resolution of disputes without the need for disciplinary action. Edwards

(1995) has claimed that union involvement tends to make dismissal and the use of disciplinary sanctions less likely. He provided two explanations for this. Firstly unions offered employees protection from unfair treatment, and secondly, provided a means through which rules and procedures were agreed, minimising the use of sanctions. Edwards concluded that unions acted as a restraining force on managerial prerogative and 'punitive modes of discipline' (ibid: 218).

It could also be argued that effective management might help to resolve workplace disputes. While, research has found little association between HRM practices and disciplinary outcomes (Edwards, 1995; Knight and Latreille, 2000), the mere presence of an HR/ personnel manager appears to reduce the rate of disciplinary sanctions and dismissals (Saundry and Antcliff 2006) and increase employee awareness of legislation regarding discipline and grievance (Casebourne et. al., 2006). Moreover, Harris et al.'s (2008) study of dispute resolution in small and medium sized enterprises found that managers who lacked expertise in HR and people management tended to resort to the perceived safety of formal procedure rather than risk resolving disputes informally.

Therefore the combined presence of trade union representation and effective HR/personnel management could be expected to have significant benefits. Edwards (2000) has highlighted the importance of 'constructive relations' between employers and trade unions in shaping both formal notions of disciplinary procedures and also the development of self-discipline. In short it might be expected that workplaces with good employee relations underpinned by high levels of trust, would be well placed to resolve disputes without recourse to formal disciplinary sanctions. This echoes case-study research whereby one of the main benefits of strong workplace partnerships between trade unions and employers was the early and informal resolution of disputes (Oxenbridge and Brown, 2004). However, HR professionals' commitment to procedural and formal solutions may sit uneasily or come into conflict with managers' tendency to prefer informal sanctions that maintain positive working relations within their immediate environment (Cole, 2008).

Overall the extant literature suggests that employee representation may play a significant role in shaping disciplinary outcomes. It also highlights the importance of informal processes of dispute resolution. At the same time there is a question mark over the impact of the right to accompaniment (Saundry and Antcliff, 2006). However, relatively little is known about the reality of workplace discipline and grievance and the part played by employee representatives and companions within both informal and formal processes. Therefore this report seeks to shed light on a number of important questions:

- How do employers handle discipline and grievance issues and what is the relationship between formal procedure and informal dispute resolution?
- What role do companions and employee representatives play within informal processes of dispute resolution?
- Do companions and employee representatives facilitate the early resolution of individual disputes and disciplinary issues without recourse to formal procedure?

- What role do companions and employee representatives play within formal disciplinary and grievance hearings? What, if any impact do they have?
- What factors shape the effectiveness of accompaniment and representation in moderating disciplinary outcomes? Is this helped or hindered by the right to accompaniment?

4. METHODOLOGY AND RESEARCH DESIGN

This report sets out findings from a small scale 'pilot' research project that aims to explore the impact of the accompaniment and representation of employees within disciplinary and grievance procedures. In particular it sought to investigate the role of companions and employee representatives at formal hearings as well as examining their involvement of trade union and other employee in earlier and more informal stages of disciplinary and grievance processes.

In order to explore the patterns and processes that shape workplace representation within discipline and grievance, the research was based on a series of twenty seven semi-structured interviews with participants in disciplinary and grievance processes. These interviews were primarily conducted within eight case-study sites, so that data in relation to workplace discipline and grievance could be located within an organisational context. This was particularly important given the centrality of workplace and workforce characteristics in shaping disciplinary outcomes.

Given the size of the sample and the methods employed, the findings of our research make no claim to be representative. Nonetheless cases were selected as far as possible to provide a diverse range of contexts and environments in terms of: workplace size; ownership; industrial sector; workforce composition; and level of trade union recognition and representation. In each organisation, once identified, a senior manager responsible for disciplinary and grievance issues was contacted by e-mail. The nature and scope of the research was described to them and they were asked if they would be prepared to take part in the research. Once access had been agreed, suitable participants were identified and interviews were arranged. A breakdown of the sample is provided in table 4.1. This is intended to give a broad sketch of the nature of the sample. Precise details are not provided in order to protect the anonymity of respondent organisations.

All workplaces were located within the north of England. Cases A and B were large private sector manufacturing businesses. In these settings union density was very high and workforces were largely male semi-skilled and skilled. The age profile of the workforce in both cases was relatively high and there was little ethnic diversity. Two mid-sized organisations were also selected, neither of which recognised trade unions nor had any significant trade union presence. However, both organisations had employee consultative fora. In one company (Case C), involved in the manufacture and retail sale of fabric products, the workforce was predominantly female with a significant minority of UK Asian employees. In the other (Case D), a distributor and retailer of electrical products, the workforce was diverse both in terms of gender, age and skill, with an increasing number of migrant workers.

Previous research has shown that public sector workplaces tend to have lower rates of disciplinary sanctions and dismissals. We included two public sector organisations (Cases E and F) within our sample. Both were relatively large employers and providers of public services. In both cases trade unions were recognised with relatively high levels of union membership. A wide variety of different occupational types and skill levels were represented within both organisations. The final two cases were both smaller companies. One was a provider of care (Case G). The workforce was largely female and relatively low

paid. However, as a service formally provided within the public sector, a significant number of employees were trade union members. However the company did not recognise trade unions. The final case (Case H) involved a small, family-owned retail business with a largely female workforce and no known union members.

Table 4.1: Breakdown of Sample

<i>Case</i>	<i>Size</i>	<i>Sector</i>	<i>Representation</i>	<i>Gender</i>	<i>Ethnicity</i>	<i>Skill</i>
A	Over 10,000	Private	TU recognised	Largely male	Largely white British	Semi-skilled, skilled
B	Over 4,000	Private	TU recognised	Largely male	Largely white British	Semi skilled, skilled
C	350-400	Private	No TU recognition – low levels of TU membership	Diverse	Significant minority of non-British	Diverse – significant proportion low skill
D	300 – 350	Private	No TU recognition – low levels of TU membership	Largely female	Diverse	Diverse
E	Over 40,000	Public	TU recognised	Diverse	Some diversity	Diverse
F	750-1,000	Public	TU recognised	Diverse	Largely white British	Diverse
G	100 - 150	Private	No TU recognition – minority union membership	Largely female	Largely white British	Low skill
H	Under 25	Private	No trade union presence	Largely female	Largely white British	Low skill

In each case interviews were conducted, where practicable, with: a senior HR/Personnel manager with responsibility for discipline and grievance issues; an operational manager with experience of chairing disciplinary and/or grievance hearings; and a trade union representative or companion. In respect of the two smallest companies, only one member of management was involved in dealing with disciplinary and grievance issues. Consequently only two interviews were conducted. In addition further interviews were conducted with regional officers of trade unions with experience of representing members in disciplinary and grievance hearings in a wide variety of settings. In total, 27 interviews were conducted including eight managers with HR expertise, ten operational managers, and nine trade union representatives and companions.

The interviews were semi-structured and gathered responses across a number of key issues:

- Background contextual information on the company including activities, sector, workforce demographics and employee representation;
- Nature of disciplinary and grievance procedure and processes and role of respondents within this;
- Nature and operation of disciplinary and grievance processes. In particular the extent to which accompaniment and representation is provided;
- Role played by HR and Personnel managers within the process;
- Comparison of formal and informal processes;
- Role of employee representatives within informal processes, prior to commencement of formal procedures;
- Scope of accompaniment within hearings;
- Impact of representation and accompaniment on outcomes.

The majority of interviews lasted between 45 and 75 minutes. It is important to note however that interviews with (non-union) companions tended to be much shorter, due to a relative lack of involvement with broader disciplinary and grievance issues. Each interview was recorded (with the permission of the respondent) and then transcribed. Transcripts were then sent to respondents who were asked to contact the researchers if they required any amendments to be made.

Interview data was then analysed. Through comparison across the data-set, key themes and patterns were identified. In addition to the interview data, copies of disciplinary, grievance and related procedures were requested from the respondent organisations.

In examining disciplinary and grievance issues, sensitive and personal information is inevitably involved. A number of organisations that were approached to take part in the research were concerned about issues of confidentiality. All participants were assured that their individual and organisational identities would not be disclosed. Consequently the findings below deliberately exclude details that would allow the identification of the respondent organisations.

5. FINDINGS

The findings of the research are organised across four themes that reflect the research questions outlined above. Firstly, we examine the **operation of disciplinary and grievance processes** within the respondent organisations. This will not only encompass the nature and operation of formal procedure but also the scope of informal action in dealing with individual workplace disputes. Secondly we focus in detail on the **role of the companion and representative**, examining the different perspectives of this role on the part of companions, representatives and managers. Thirdly, the report explores the **impact of companions and representatives on disciplinary outcomes**. In particular we will attempt to identify how companions and/or representatives are able to affect decisions within disciplinary and grievance processes and the role that they play in resolving workplace disputes. Finally, we attempt to identify and discuss those **factors that shape the effectiveness of companions and representatives** in moderating disciplinary outcomes.

5.1 Operation of disciplinary and grievance processes

5.1.1 *The extent and scope of procedure*

As discussed above, formal disciplinary and grievance procedures are now commonplace in UK workplaces, even amongst small companies that have traditionally dealt with such issues in an informal manner. The introduction of statutory dismissal and grievance procedures is likely to have reinforced procedural formality across industry. Within our sample all respondent organisations had well established written procedures for dealing with both employee grievances and discipline.

Although they differed in the amount of detail and guidance provided, there was a general uniformity within the respondents' procedures. All those examined complied with the Dispute Resolution Regulations. Most of the procedures either referred explicitly to, or appeared to be modeled on, the Acas Code of Practice on Disciplinary and Grievance Procedures. Grievance Procedures were generally shorter than disciplinary procedures giving greater latitude for informal discussion and resolution. The majority indicated that grievances should wherever possible be dealt with informally. All procedures required formal grievances to be put in writing and provided for a hearing and a subsequent appeal. In one case, there was a right for two appeals. In some of the larger workplaces within our sample, in-house mediation was offered to employees with grievances, particularly in relation to dignity at work issues.

All disciplinary procedures that we examined had an informal stage or a reference that minor issues would be dealt with informally by an employee's line manager. The majority of the procedures examined then had four stages – verbal warning, written warning, final written warning, and dismissal. In two cases, further details were given in terms of the extent and nature of disciplinary investigations, but in most procedures, there was a degree of flexibility in terms of the conduct of disciplinary proceedings. This aspect was limited to a number of principles such as investigation, accompaniment, no dismissal for first offence, etc. which again

followed the Acas Code of Practice. There was no evidence of mediation services being used for disciplinary issues.

In terms of accompaniment, all had some provision to accompaniment or representation that would meet employees' statutory rights. In most this was simply stated as:

'at all stages the employee will have the right to be accompanied by a work colleague or a trade union representative'.

However the precise nature of this varied. For example in two public sector organisations the right to accompaniment at disciplinary hearings was extended to a 'friend' in addition to work colleague and trade union representative. Other procedures placed explicit limitations on who could accompany. In one organisation, employees were entitled to request trade union accompaniment but the procedure specified that *'External professional witnesses will not be able to attend'*. This was intended to prevent solicitors from acting as companions. Interviews suggested that most organisations were prepared to extend accompaniment to a family member where it was appropriate and requested by the employee.

The scope of accompaniment was not set out explicitly in most of the procedures examined. However the procedure of one large private sector organisation, in which unions were recognised, stated that, *'the employee will have the right to the presence and assistance of a recognised trade union representative or work colleague'*. This is much more broadly framed than the statutory right and suggests the acceptance of a more representational role. Another notable reference to representation was contained in the Grievance Policy and Procedure of another highly unionised private sector business. Under the heading of 'Informal Resolution', it stated that:

'It should be recognised that the TU Reps have considerable experience of assisting employees with grievance issues, and they can provide considerable assistance with the process and in working to resolve the issue'.

To some extent the level of formality was dependent on the nature of the organisation but the main factor appeared to be sectoral. The most formal procedures that we found were in public sector organisations. This related both to the nature of the procedure and its operation. Public sector procedures tended to be more complex and detailed than those in the private sector. There were two distinctive traits that we identified. Firstly in one case, individuals had a right of appeal against dismissal to a sub-committee of elected council members, advised by an in-house legal advisor and a member of the HR/Personnel Department. This was not seen as a negative by management respondents and was valued by the union representative interviewed as helping to underpin the legitimacy and independence of the disciplinary process. It was acknowledged however that making an appeal in such a highly formalised setting could be very daunting for the employee concerned increasing the importance of effective representation. Notably, the other public sector organisation within the sample had removed the right of appeal to elected members from their procedure approximately eighteen months prior to the research.

The second distinctive element within public sector settings was the quasi-judicial nature of disciplinary hearings. Typically, the case against the employee would be made by a line manager who would call the investigating officer as a witness. Witnesses could be called by both the employee and management sides and could be cross-examined by the presenting manager, the employee (and or their representative) and the disciplinary panel. In general, the formality of the hearing was seen as important in ensuring natural justice within the process:

"I think it's easier not to be truthful in a statement and it's not too easy to continue that position when, you know, you've got to sit in front of somebody and say what you saw that they did and what you heard that they did, etc. So I think from that point of view it's an advantage because I do think it's a difficult thing to sit there and lie."

(Trade union representative)

5.1.2 Function and operation of procedures

All respondents were asked what they saw as the main function of disciplinary and grievance procedures. Grievance procedures were seen as an important element of employee voice and a channel through which problems could be raised and resolved. Amongst our respondents there was little dispute about the need for formal written grievance procedures, however, there was a consensus that by the time grievances reached the point of a formal complaint they were very difficult to resolve. By this time it was felt that positions were often entrenched.

In regard to disciplinary procedures, there was general agreement that, in theory at least, they were a tool for improving behaviour rather than a punitive mechanism. While it might be expected for HR professionals to have this view, this was also shared by all of the operational managers that we interviewed, irrespective of the size and type of organisation in which they were employed. The following were typical:

"if you have to dismiss somebody that you've invested a lot of money in then there's a degree of failing. So the end view always has to be try to realise the investment that you've put in people by correcting behaviour."

(HR Manager)

"I don't see it [disciplinary action] as a stick to beat somebody with unless it's gross misconduct...In terms of things like absence management or performance management, I see it as a tool to change that behaviour."

(HR Manager)

"It's to correct unacceptable behaviour and performance really and to try and point people in the right direction to prevent it happening again."

(Operational Manager)

Trade union representatives argued that disciplinary procedures were crucial in ensuring fairness and in correcting behaviour.

"We see it being there to help people and improve their behaviour patterns rather than a way of a means in getting them out the door and I think the company is on board with that as well now."

(Trade union representative)

However, the view of the trade union respondents varied depended on the organisational context. For example one union representative linked the development of a more performance driven culture to the introduction of a much more draconian application of procedure.

"The disciplinary procedure is obviously used as the punishment, very often the big stick to beat people with.....the 'right word at the right time' attitude is there in the policy. It should be used really before they move into the formal process. In my view it's not used anywhere near enough."

A further benefit of procedure was the degree to which it allowed for a consistent approach throughout the organisation. This was cited by HR managers in terms of ensuring that line managers did not act hastily and in contravention of employment legislation. From the point of view of operational managers and those in smaller organisations, procedures were vital in providing a route map for dealing with disciplinary and grievance issues. Within smaller workplaces, having a procedure was seen as invaluable in de-personalising what were often very difficult situations.

A very personal business – discipline and grievance in a small workplace

Handling grievance and disciplinary issues takes on a very personal complexion when the organisation is run by one or two people who pride themselves on good and close relationships with their staff. This was the situation in one of the case-study organisations that employed eleven people in three shops and one warehouse. Ten of the employees were female sales assistants, predominately working part-time. There was one male member of staff who works in the warehouse. The stated aim of the company was to operate to high ethical standards. The company had a specific policy of attempting to provide flexible working arrangements for employees with young families.

The company had written grievance and disciplinary procedures, which complied with the Acas Code of Practice and fully complied with the right to accompaniment. The size of the company inevitably meant that relationships between managers and staff were informal and most minor issues were normally resolved in this way. However, when problems became more serious, the close relationships between employer and employee meant that disputes became very personal very quickly. In this context, having a formal procedure was seen as invaluable by the company owner in order to provide structure and objectivity. It also provided the time and space to consider the situation and issues involved in a rational manner. This was very necessary due to the emotional attachments to the business and employees in such a closely knit environment.

The role of the companion was seen as observing what happened at the hearing so mitigating against the vulnerability the employee feels. This could also prevent gossip and hearsay about what has happened circulating to other staff. The companion in such a small company however was also in a difficult position given the close personal relationships amongst the parties. Typically, the employee who had acted as companion had no training in disciplinary issues and had never been present at a disciplinary hearing. She/he attempted to advise her colleague before the meeting, but remained silent during the meeting itself. However she/he had some experience of HR issues from a previous job and therefore was able to explain to the employee that she/he was not being sacked and that if she/he improved her behaviour she/he would keep her job. The companion felt that this persuaded the employee against resigning following the disciplinary hearing.

5.1.3 Formality and Informality

The tension between the need for procedural fairness, consistency and legal compliance and the role of informal processes in dispute resolution was evident throughout our research. Respondents consistently stressed the importance of informal action prior to the onset of formal procedure. Identifying and resolving issues at an early stage was seen as essential. Most respondents argued that once formal procedures were activated, potential conflict was much more difficult to avoid. Smaller companies with much closer personal links between employees and employers lend themselves to such informal approaches, as an HR Manager explained:

"a lot of petty stuff that people probably would go through the disciplinary for, I always tried to deal with it informally and I'd always give people, 'Right, this has happened, you do know that this could have lead to...however on this occasion I'm just going to put a note on your file and if it ever happens again...'"

But, even in larger unionised workplaces, in which processes were more formalised, informal action on the part of line managers was seen as key in nipping potential problems in the bud:

"It [the disciplinary procedure] gives you the framework and it provides you with consistency as well and the key to disciplinary, what we always encourage, is informal chats and counselling before we get into the disciplinary procedure...We'd either expect the team leader to have a quiet chat with someone, say, 'Hey, do you realise what you're doing? Do you realise this?' and then say, 'Look, you need to pull your socks up'."

(Operational manager)

The viability of informal resolution depended on the nature of the offence committed or the seriousness of the complaint. Attendance and performance issues or minor disagreements between colleagues were most effectively dealt with in this way. More serious allegations or gross misconduct necessitated a more formal approach, but even in such cases, the root cause of the problem could be uncovered through informal discussion.

"I think the day-to-day issues can be resolved, and in some ways if somebody's got a personal problem that's affecting their workload, disciplinary isn't the way you should be dealing with it, because if they've got personal problems, you've got to try and help them through that and hope they come out the other end"

(Operational Manager)

For the most part informal attempts to resolve disciplinary and grievance issues took place prior to formal proceedings and generally involved line managers discussing matters with the employee. We found evidence however, that informal discussions were not precluded by formal proceedings. As we examine in greater detail below, where trade union representatives were present, informal and formal processes often existed side by side. A number of management respondents also stressed that it was possible and important to try to conduct hearings in a relatively 'informal way'. Respondents suggested that hearings should be more like a "discussion" or "conversation". While this could easily be

applied in a grievance situation, a number of managers also claimed to use this approach with disciplinary issues, especially at earlier stages of the procedure.

"I've sat in disciplinaries before and witnessed disciplinaries where people have seen it as a telling off session..It's a corrective measure so you need to talk to them; you need to gain their respect from minute one...If they can be open and honest with you, you can help them to improve it. If they feel you're just going to go in there and talk to them disrespectful, take it as an opportunity to have a go at them, they're not going to open up to you"

(Operational Manager)

However there was a limit to informality. Two organisations (of very different sizes) that employed employees in care facilities were often restricted in how they dealt with issues due to the regulatory frameworks within which they operated. The duty of care to clients (as well as employees) meant that they had no option but to deal with serious complaints and potential misconduct through formal grievance and disciplinary procedures.

There may also be situations where an employee has not been prepared to acknowledge and address problems that have been identified. In this context, a more formal approach using the disciplinary procedure is needed to serve as a 'wake-up call' for employees. This was explained by the owner of a small retail business:

"I don't see it as a way of bullying. I think it's a way of communicating the seriousness sometimes of what's actually happening and listening too if there are extenuating circumstances."

Views in relation to mediation were mixed. Within our sample mediation was limited to larger workplaces, used in relation to grievance situations and generally as part of a Dignity at Work procedure. One union representative saw it as a useful alternative to putting in formal complaints that invariably became extremely protracted. One HR manager, with significant experience in this area, was more sceptical and argued that mediation was extremely difficult in dignity at work cases due to the seriousness of the issues involved. By the time an issue was referred to mediation, the parties involved tended to have fairly entrenched positions that inhibited resolution.

5.1.4 Extending the formal

Respondents suggested that there had been a drift over the last two to three years towards greater formality in the handling of disciplinary and grievance issues. There appeared to be a number of reasons for this. Firstly, there was an enhanced perception amongst line managers of the extent of legislation in this area and of the dangers of possible litigation. The spectre of having to appear at an employment tribunal was a powerful deterrent from departing from procedure. An operational manager from a non-union organisation described it as follows:

"People do want to feel protected, I think, managers and supervisors, so that they know that there will be no come-uppance from anywhere else. Nothing will come from left field from a third party, that they said this, that and the other. That's why you have to be careful when you're dealing

with somebody off the record, you have to discuss it with [HR manager] just in case she feels at that stage that it might be better if you deal with it in this particular way."

The fear of employment tribunals was less apparent within the larger organisations, in which operational managers seemed to be relatively confident about the robustness of their procedures. Here there was concern about potential criticism from within the organisation if a problem was not referred through the procedure. The experience and confidence of the line manager appeared to be an important factor in determining the formality of approach. It was felt that less experienced managers were a little more prone to 'hiding' either behind procedures or the advice of the HR department:

"...more experienced managers will be more willing to deal with issues whereas the more inexperienced, nervous managers might prefer to do it down the formal route because they feel they've got more HR support then."

(HR Manager)

The changing role of HR within discipline and grievance was also cited by a number of respondents (both operational managers and trade union representatives) as a source of greater procedural formality. In all but one of our case study organisations, the role of HR was to provide advice and support to the operational managers who were charged with making decisions. However, it was suggested that the increasing complexity of the law and the vulnerability of line managers was seeing HR advisors becoming increasingly influential within the process. HR managers were mostly seen to play a positive role, ensuring consistency, legal compliance and fair play. This was particularly the case where HR Managers were experienced and/or had developed good relationships with the various stakeholders. However, in organisations in which HR provided 'remote' advice as opposed to having a day-to-day presence in the business, there appeared to be a more process driven, formal approach to discipline and grievance which militated against dispute resolution. An experienced manager explained this as follows:

"I think sometimes that [greater formality] can be sponsored by HR people, HR graduates that have come straight into the organisation and know the process and procedure and know the law but don't have the experience and the knowledge to be able to work outside of the box so the advice they give to managers is that the process is the process, chop, chop, bang. Stick to process and the process will protect you."

This was perceived to be more pronounced where line managers were inexperienced. Here there was a suggestion that the greater procedural and legal knowledge possessed by HR advisors led some line managers to defer to their expertise.

In some cases formal procedures were necessary and unavoidable. Furthermore, it was acknowledged that some weaker line managers needed to be prompted to use procedures in order to confront performance issues. In other situations, HR managers were forced to use procedure and the threat of legal consequences as a way of controlling line managers who may be tempted to take hasty and harsh disciplinary action. An HR manager explained that they had recently dealt with a

case when they had to instruct a line manager not to carry out a threat to dismiss a worker with less than twelve months service:

"I know what they'd like to do but I just have to be a real stickler and just explain, as I did, the reason why you can't do that is because of the ramifications that may come of it".

Greater procedural formality was also not necessarily beneficial for employees. Of course, it provided protection against unfairness and inconsistency but a number of respondents believed that employees could be intimidated by formality. This could lead to defensive and entrenched positions from which any resolution would be difficult. This appeared to particularly be the case within smaller and non-union organisations where relationships between staff and management were generally more personal. Here the sudden introduction of written procedure seemed to jar. The following response was typical:

"The only thing I don't like, although it's keeping within the law, is that if I have to have a meeting with somebody they get this letter saying, 'You'll need to come to a meeting at this time on this date. You can bring somebody with you to discuss this, this and this.' If I received one of those it would put the frighteners up me!... I would prefer to say, 'I think we need a meeting. I think we need to discuss this further and if you want to bring somebody along, we're going to discuss this and this.' ...Perhaps they'll say, 'Do you mind if we do it after lunch? I don't want this hanging over my head for two or three days.' In some instances, if you've got a weekend, it can be quite nerve-wracking for them."

(Operational Manager)

5.1.5 Summary

All the organisations within our sample followed clear procedures in handling discipline and grievance. While the nature of those procedures varied dependent on the size and context of the organisation, all met basic legal requirements and reflected the principles within the current Acas Code of Practice on Disciplinary and Grievance Procedures. In terms of the right to accompaniment, all organisations offered this explicitly within their procedures with some going beyond the statutory minima.

The clearest finding from the research was the emphasis placed by all respondents on the importance of informal processes in resolving disciplinary and grievance issues. While it was acknowledged that certain issues had to be dealt with through procedure, informal resolution was seen as crucial. Mediation was not used widely within our sample. Where it was used to resolve grievances opinions as to its usefulness were mixed.

However, there was evidence, amongst the case-study organisations, of a number of factors encouraging a more process-driven approach to handling discipline and grievance. Interestingly, the introduction of statutory dismissal and grievance procedures were not explicitly cited by respondents, however it was sometimes felt that requirements to put matters in writing were not helpful in resolving issues. More broadly, the threat of legal implications and fear of internal criticism seemed to be driving less experienced managers away from informal paths to resolution. Furthermore, the nature of the relationship between HR

managers, line managers and employee representatives was critical in determining the approach used in disciplinary and grievance issues. We return to this issue later in the report.

5.2 The role of companions and employee representatives

5.2.1 The extent of accompaniment and representation

All organisations within the sample made it clear to employees facing a grievance or disciplinary hearing that they were entitled to be accompanied by a work colleague or a trade union representative. In two cases accompaniment was also extended to friends (not exclusively work colleagues) of the employee. In reality, a number of organisations sometimes allowed family members or friends to accompany even when this was not provided for within the procedure. One respondent cited the case of an employee who was facing dismissal on grounds of ill health. Due to her medical condition, the company allowed her to bring her husband with her for support. Unfortunately the presence of family members was seen by a number of respondents to be unhelpful as it tended to over personalise the situation. The intervention of solicitors, in particular, was seen by all respondents as unhelpful in relation to workplace disputes.

It is important to note that organisations within the sample routinely reminded individuals of their right to accompaniment when inviting them to a disciplinary or grievance hearing. This conforms to the current Acas Code of Practice. No respondent expressed any specific concern about the current practice of informing the employee of their right to be accompanied.

In the majority of the written disciplinary and grievance procedures the right to accompaniment was provided for at 'all stages' or at 'each stage'. Two of the case study organisations restricted accompaniment to the hearing stage – as specified in the legislation. In others, accompaniment was permitted throughout the process. This normally included investigatory interviews, formal hearings and meetings to consider suspension. In addition, in a number of organisations witnesses within disciplinary proceedings were also offered accompaniment.

There was also a clear demarcation in the scope of accompaniment allowed by respondent organisations. In those that did not recognise unions, employers stuck fairly rigidly to the legislation. Specifically they did not allow companions to answer on behalf of employees. The managers (operational and HR) who were interviewed appeared to have a good knowledge of the right to accompaniment. However in only one organisation, did the manager clearly explain the right to accompaniment at the start of a hearing. The non-union companions within our sample had either not been fully briefed as to what they could and couldn't do at the hearing or had been told that they were simply there to observe. According to one companion:

"I was not allowed to leave the room at all; we just had to sit there. We weren't allowed to discuss it with anybody else in the business, regardless of who asked. I was told not to comment on anything or speak to her during it. I was just there for pure support...I did not think it was quite right, because part of the way through – when she was getting upset – I just said, 'I think we need to stop'... I felt that I was there purely to sit,

give her a tissue, and talk to her whilst they decided what punishment they wanted to give her."

In addition, non-union companions often had little notice of the hearing and were rarely provided with documentation or information in order to prepare for the hearing beforehand. It is important to note that this was not necessarily the fault of managers. There is no legal obligation on employers to provide companions with information and it is the responsibility of the employee to notify their companion of the arrangements for the hearing.

In contrast, within larger unionised organisations, there was generally an assumption that trade union representatives were fully aware of their rights at disciplinary and grievance hearings. In fact in most cases trade union representatives were not restricted and were allowed to fully represent their members. Managers accepted that there were times when employees were unable, or not sufficiently articulate, to express themselves. In such cases representatives would be allowed to answer questions on behalf of the employee. Trade union representatives felt that managers were generally flexible about this. According to a senior shop steward:

"I would say they're probably more accommodating than not. You will get the odd ones who want them to speak and say something and you'll say, 'Look, he's nervous as anything. You're not going to get a lot of sense out of him'."

However there were limits to the latitude that representatives were allowed:

"there are times when that causes a degree of tension when the representative will almost refuse to allow his member to speak and he or she will try and answer all the questions on behalf of the employee. Obviously we won't tolerate that."

(HR manager)

Overall, therefore there was a clear difference in the application of the right to accompaniment within unionised and non-unionised environments in this sample.

5.2.2 The first point of contact? – representatives, companions and informal processes

As discussed in 5.1.3 above, respondents emphasised the importance of informal processes in resolving disputes and avoiding unnecessary disciplinary sanctions. This section examines the role played by companions and representatives within the stage prior to formal disciplinary action.

As the right to accompaniment applies to formal hearings, companions, by definition, do not play any role prior to a hearing. We found no evidence, within our sample, that non-union companions were involved by management in informal attempts to resolve disputes. In two of the non-unionised organisations there were employee consultative bodies. However, the employee representatives on these fora played no significant role within dispute resolution. Where there were union members within these companies, the trade union rarely played any informal role:

"Well if there isn't recognition, I normally get involved at a much later stage and a member rings you up and says, 'I've got a disciplinary in four days' time'. So you then say, 'Oh'. You go through the history and you find it wasn't very long ago that they got told that there was a disciplinary hearing or even an investigation sometimes."

(Trade union representative)

Within this sample, the nature of the relationship between trade union and employer was critical. Where there was no union recognition, relations tended to be adversarial with little contact between the union and company management. However, even within small organisations, where there was recognition union representatives claimed that informal processes could inform the handling of disciplinary and grievance issues:

"you can more quickly work out whether it's arbitrary or not, whether it's correct or not in that sense. There is more information about the disciplinary. You're familiar with the workplace. You've had the dialogue with the employer effectively, so you're able to make an earlier judgement...one goes and talks to management side about what's the case. How strong is it? Where is it going? Do you think this is gross misconduct with a dismissal or is it a first or a final? Where's your parameters, and that's not that they adjust according to that, though sometimes they will, but that's valuable".

(Regional trade union officer)

Within larger, unionised settings the first contact with an employee would not necessarily involve a representative. Line managers would attempt to deal with minor issues on an informal basis. However, where the issue was potentially more serious, or where initial attempts at resolution had not been successful, trade unions were routinely involved. Partly this reflected the influence of the union in the organisation, however, all the management respondents interviewed in unionised environments saw early union involvement as valuable. The following example was typical:

"I've had first-hand experience of delicate issues of bullying going off in a department that the people were not dealing with, but they spoke to the union rep, the union rep comes to see me as line manager responsible for this area at the time, saying, 'This is bubbling up, and so and so is getting upset about it.' Then you can get engaged and avoid what would've been some serious allegations and issues."

(Operational manager)

In some cases the manager would routinely contact the union representative when serious disciplinary or grievance issues were raised. Management respondents cited a number of reasons for this. The first was that it represented fair, ethical practice:

"Our instinct would be to involve the union partly as a reassurance to the employee. We would like the employee to be getting advice. We would feel better as a caring employer if the employee was getting advice from the union that the proposed course of action was appropriate."

(HR Manager)

Secondly, in order to preserve the relationship between union representatives notice being given of serious issues was seen as a matter of courtesy. Thirdly, in certain situations management were able to approach the union with an early warning of an emerging disciplinary issue either with an individual or a group of employees. In this sense the union was used as an arm of management, to try and resolve issues before they escalated. Respondents argued that warnings from trade union representatives may have more force and legitimacy than reprimands from line managers. There was also evidence, within this sample, of trade union representatives working with employees to ensure that they stayed out of disciplinary proceedings. This was a role that management would be unable to perform and that individuals would be unwilling to allow them to:

"People used to come in late all the time. I'm always in for 7 o'clock in the morning. My colleagues and the other reps, they'll ring people up in the morning...If people are struggling to get in for whatever reason, we'll make sure that they're in here for the right time. We won't tread softly with them. We'll tell them as you would with your mates - 'We'll do so much to help you, as much as we can but we're not going to be taken for mugs. We won't be used in that way but we will help you if you need help or is there any reason why you're coming in late? Have you got problems at home? Is there anything we can sort out?' and sometimes they'll sit down and talk to us and then we can go to HR and tell them and then hopefully we can try and do something to resolve the situation then."

(Trade union representative)

Finally, respondents suggested that unions were often best placed to get to the root cause of a particular issue. It was argued that some employees facing disciplinary action have a fear of talking to their manager and particularly to the HR department in case they make their situation worse. This was particularly the case if personal issues were involved. However, they may be prepared to 'open up' to their trade union representative. In this way trade unions can act as vital channel of communication in disciplinary and grievance cases.

While this paints a generally positive picture of the role of trade union representatives in informal processes of dispute resolution, this was clearly dependent on the quality of the relationship between the various parties – the line manager, HR advisor, trade union representative and employee.

5.2.3 More than an observer? The role of the companion within disciplinary and grievance hearings

In this section we examine the role of non-union companions within formal hearings. As we noted above the extent to which companions themselves are informed as to what they can and can't do appears to be relatively haphazard. Views from employers as to the role of non-union companions were mixed but on the whole they were seen to play a fairly minimal role.

Companions within the sample rarely had any training or experience of disciplinary and grievance processes. The reasons why they were asked, and agreed, to be a companion were varied. Firstly, employees seemed to ask their immediate work colleagues, friends and family members. Secondly, companions were identified by employees as people who they trusted and thought might 'stick up for them'. Thirdly, in the case of employees with poor English language skills

companions were asked because they could translate during the hearing. The following comments from companions were typical:

"They just asked me to come in with them because I worked behind him...I work the table behind where he works so he just asked me."

"I am quite friendly with everybody in every department, except the contact centre, so if there is an issue, people seem to come and tell me about it. If it has gone to disciplinary, they will say, 'Will you come with me?'"

"I still got on very well with her; we understood each other; we just got on really well, and, yes I think she just trusted me; she trusted that I would help her through it."

One management respondent even claimed that some of his staff volunteered to be companions because it meant half an hour out of work. Interestingly in two of the non-unionised organisations there were employee representative bodies. However there was no evidence that employees turned to members of these bodies for accompaniment at hearings.

Management respondents reported that some employees were concerned about being a companion because of possible ramifications. Non-union companions feared being implicated in the issue or seen as a troublemaker. One manager reported that they were often telephoned by employees who had asked to be companions, worried about whether it would affect their employment. Another gave the following illustration:

"One guy got asked to go in with someone. He didn't want to go in and he actually came to myself and my line manager and said, 'Look, I really don't want to go in this disciplinary...I don't want you to think I'm involved in it in anyway'. We said, 'Look, he's asked you to come in, just go in, just observe. You don't need to say anything. We don't think bad of you in any way...'"

Within the case-study organisations, companions were seen to have two main roles. Firstly, they were there as a safeguard in the event of management malpractice and unfairness. Secondly they were present to provide moral support.

"I think it is just someone to talk to if they are getting upset, or just to have someone with you I think – it makes you feel that little bit safer".
(Companion and Senior Manager)

"I think basically to ensure that things are done correctly. To ensure that someone is not being, if you like, verbally bullied or not having undue pressure put on him or words put in his mouth in any way. They're just there to observe and to be there to accompany the employee and to make them feel at ease and also just to make sure that the disciplinary is held in the right way...".

(Operational manager)

However, non-union companions were seen by management to play little role in hearings. It was unusual for them to make any contribution. According to an HR

manager in a small organisation, most companions:

"just sit there with a pad of paper and a pen, like that. That's all they do. They don't really write anything down...I remember one lady once writing some things down and then she came out and said to me, 'What am I supposed to do with this?'"

The role of companions in a non-union environment

The shortcomings of accompaniment within discipline and grievance procedures were clearly illustrated by the case of a medium-sized organisation involved in the assembly and sale of a range of products. The company did not recognise and had a generally negative view of trade unions. Managers were not aware of any significant level of trade union membership.

The organisation experienced a wide range (and relatively high level) of disciplinary and grievance issues. This was partly explained by the nature of certain operations and the skill level of employees. For example, disciplinary issues tended to be concentrated in the company's call centre and warehouse. Most of the disciplinary incidents were related to lateness and unauthorised absence and parts of the company averaged one disciplinary a week. In addition, the company dealt with between 4 and 8 cases of gross misconduct each year. The company has well established procedures which appeared to be well observed. However on most issues, the current HR manager advocated a flexible, informal approach and saw the disciplinary process as a means of changing behaviour. Retraining, counselling and coaching were all cited as options that were routinely tried before formal procedure was invoked.

The previous HR regime adopted a more rigid approach and was seen by many employees as an organisational 'police force'. This created a culture that could inhibit informal resolution. Respondents suggested that some managers tended to implement procedures, particularly in relation to absence control, in an inflexible manner. Partly this reflected a fear of litigation. There was particular concern over dealing with formal grievances especially where complaints involved discrimination. Here, managers sought to move to formal procedure very quickly.

All employees were offered accompaniment at both grievance and disciplinary hearings. However, employees often did not take up the opportunity of accompaniment. From a management viewpoint the role of the companion was to observe and ensure that management behaved fairly. In fact, companions rarely spoke or asked questions. Managers accepted that companions often seemed to be uncomfortable or embarrassed about being present. Management respondents were aware that some work colleagues may be concerned that there could be repercussions on them as a result of taking this role.

Companions were rarely given detailed information regarding the nature and scope of their role, and about the case itself, prior to the hearing. The companion who was interviewed had been briefed by the previous HR Manager and told that her role was predominantly a silent and a supporting one. She was told it was 'not for you to make comments' and felt powerless to play an active part in the hearing. Overall, companions were seen as having little or no impact on the outcomes of hearings. However it was felt that this did not have to be the case and that a crucial factor was the degree of knowledge or experience of the companion. Management respondents thought that trained representatives would be extremely useful in terms of reaching a fair decision and in finding resolutions to disputes.

The failure of companions to play an active part in formal hearings was perhaps not surprising given their uncertainty over their role and the possible ramifications. The companion would generally not be provided with documentation and evidence relating to the case, unless they had specifically asked for this from either the company or the employee. Therefore they would tend to go into the hearing with relatively little information or preparation.

The extent to which the role of companion went beyond merely being an observer appeared to depend entirely on either the personality or the experience of the companion. Respondents within our sample reported that most companions lacked the necessary confidence and skills to have a major impact. But this was not always the case. For example one companion played a significant role in advising her work colleague both before the hearing and during the adjournments. She felt able to do this because she had previously worked in large organisations and consequently "*knew a bit about employment law*".

5.2.4 Accompaniment or representation? – the trade union role

According to our respondents, trade union representatives played a number of different roles at disciplinary and grievance hearings. As with companions they acted as a friend and as a source of moral support. They also tried to ensure fair-play and natural justice. However the key difference was that trade union representatives were normally trained and had a degree of legal knowledge that enabled them to contest procedural issues. Indeed a number of respondents (both management and union) agreed that the trade union representative was often more knowledgeable than the manager chairing the hearing.

Union representation within formal hearings had two positive effects. Firstly, the managers involved had to ensure that their process was fair and robust. An operational manager within a non-union organisation described his one and only encounter with a union representative as follows:

"it was a help because it makes you become more structured. You've got to be on the ball all the time. You can't miss a trick. Where, without sounding bad, you could probably sit through a disciplinary and maybe switch off for twenty seconds and pick up the pace. With a union rep in there you can't miss a thing. You can't miss a heartbeat because they'll just grab you on it."

Secondly, management respondents working within unionised environments believed that most union representation helped to manage the hearing efficiently. This was partly due to the fact that they had a good knowledge of the relevant procedures. But also, where there were established relationships between the representative and management, it was in the union's interests to deal with the issues in a reasonable and responsible way in order to maintain that relationship. The union were seen to play a key role both in explaining the procedure, the implications of the situation, and in managing the expectations of the member. They could also be useful in defusing pressured situations that might develop within a hearing. This was the view of an HR manager within a public sector organisation:

"Well, the union will have spent some time with the individual before the meeting ...exploring what the implications are for that individual and will have done a lot of the work in determining how they're going to respond to those issues so that we have some rational response. Usually we'll give them some sort of explanation, just what kind of position they're in and I believe the unions will have given them some advice on their best approach to minimise the difficulties that they are facing."

Of course this depended to some extent on the personality and experience of the representative concerned. While most respondents within unionised settings found trade union representatives to be constructive, both management and union respondents admitted that a minority of union representatives could be overly confrontational in their approach.

"They're very useful - the vast majority. Of course, we deal with a lot of trade unionists and they're not all as skilled as each other and there are still some who are table thumpers - 'you can't do that to my member' regardless of what the issues may be."

(HR Manager)

Managers within smaller non-recognised environments had a different view and argued that the intervention of trade union officers was not necessarily helpful. Trade unions were viewed in these organisations with some suspicion. Relationships and consequently the conduct of disciplinary and grievance hearings were more formal and adversarial. This appeared to be particularly problematic where employers feared a claim for statutory union recognition and believed that representatives were using disciplinary issues to win new members. This feeling was illustrated by the following quote from an HR manager in a small non-union organisation:

"We thought he's obviously trying to get his numbers up then he could have forced a ballot to try and get recognition. But yes, I think he was playing up because I think he wanted to come in and be the big 'I am' and then they'd tell their mates and their mates and then they'd all join and then they could get in."

Irrespective of the setting, trade union representatives saw their main role within a disciplinary or grievance hearing as acting as an advocate for the employee and getting the best possible result. In hearings at which an employee was facing potential dismissal or appealing against dismissal, this involved trying to 'win' the case, normally through highlighting procedural deficiencies, and possible breaches of legislation. This was particularly the case within more adversarial processes where part of the role of union representative would be to cross-examine witnesses.

In trying to get the best possible outcome, a key function of the union representative was to ensure that the employee explained their case as fully as possible, even, if this sometimes meant going beyond the role of companion and answering questions on behalf of the employee. In the pressured situation of a disciplinary or grievance hearing, this was seen to be important by both managers and representatives in establishing the facts of a case and coming to a fair decision:

"if the individual, for whatever reason – nerves, capability, anything of that nature – can't put forward their own case, if the shop steward or the full time official can put a better justification to it or the full time official can put a better justification to it then you're going to get a fairer output from the hearing."

(Operational Manager)

Furthermore, in many disciplinary situations there were underlying mitigating circumstances of a personal nature. Respondents generally believed that it was more likely that such issues could be explored where the employee was represented. However, this was also dependent on the degree of trust the individual had in their union. A senior HR manager in a heavily unionised organisation described this as follows:

"You can say to a TU guy, 'I know there are things that aren't coming out on the table. I'd like you to have an adjournment and just talk to Harry and have a talk to him because I'd like to ask some questions and I'd like the answers. So you have a talk to him about it and tell me whether you're willing or not to put it all on the table', and the Trade Union will go and talk to them in a way that we can't and facilitate the situation."

We also found that in a significant number of cases, the representative's strategy as an advocate was not to 'win the case' but to get the employee to face up to her/his misconduct and then pleading mitigating factors or asking a disciplinary panel to take into account good service. Respondents felt that unrepresented employees were far less likely to admit misconduct because they assumed that this would inevitably mean they would lose their case.

"We are fortunate within our unions that they will not go out of their way to advocate for somebody who is clearly in the wrong...the unions, I would say play a vital part in helping that individual to understand that their conduct has not been appropriate or indeed sometimes provide them with the responses they need to extricate themselves from the situation whether they are actually not guilty of any misconduct but haven't been able to put into words the reasons they've done what they've done."

(HR Manager)

Trade union representatives were also seen to have a role in following up cases after disciplinary sanctions have been made to try to avoid repeat behaviour and more serious disciplinary sanctions. An operational manager at a large unionised organisation explained that trade unions had helped management in avoiding further disciplinary action for a valued employee.

"...it wouldn't have helped the company to lose somebody of his skill but that's why we use the union afterwards and say, 'You need to keep an eye on this guy because he's one of your members. We're going to get to a point where we have to dismiss him because he's not changing,' and we have seen in the last twelve months a change in his behaviour."

Partnership, trust and dispute resolution

A key finding from the cases within our sample was the importance of high-trust relationships between managers and employee representatives in underpinning informal processes of dispute resolution. A prime example of this was a large engineering business employing a core of skilled, predominantly white, male employees. Union density was extremely high and the relationship with trade unions is underpinned by a partnership approach and seen as generally positive by managers and representatives alike.

Discipline and grievance issues were dealt with in accordance with well-established procedures and the number of formal disciplinary cases each year was relatively low. Dismissals and formal complaints through the grievance procedure were rare. Informal processes were seen as the most effective way to resolve grievances and to minimise disciplinary sanctions. Trade union representatives were seen by managers as playing a key role in this respect. If managers were seeking to get to the bottom of difficult and sensitive issues, trade unions provided a point of contact. Often employees would be much more likely to confide in and be honest with their union representative. Union representatives also served as an early warning system alerting managers to potential problems which could then be 'nipped in the bud'. For example if a dispute was 'bubbling up' between two employees, the union representatives may alert management so that the issue could be resolved before it developed into a formal grievance. Central to the success of such approaches were good, trusting relationships between managers, HR advisors and union representatives.

However, according to management and union respondents there were signs of a gradual move towards a more formal approach, particularly in disciplinary matters. In some cases, line managers, especially those with less experience, tended to resort to formal procedures because they felt vulnerable to the possible legal ramifications of a decision and possible criticism from superiors. Also while most HR advisors were seen as very helpful, some tended to exacerbate issues by placing too much emphasis on legal considerations. The shift to a business partner model of HR management meant that some HR advisors worked remotely from the unit they support. This was not seen as useful in establishing high-trust relationships with both union representatives and line-managers.

Employees had the right to accompaniment at all stages of the disciplinary and grievance procedures. In almost all cases employees were accompanied by their union representative. Within formal hearings, union representatives played a very active role. Most were viewed by managers as being knowledgeable about procedural and legal issues. In general they were seen as playing a positive role within formal hearings and helping managers to reach a fair decision. In particular they helped to make sure that all relevant information was put forward. They were also able to explain clearly the potential consequences to the employee. Finally, in certain situations, trade union representatives monitored employees subject to a disciplinary sanction or following the resolution of a grievance to try and ensure that the situation did not recur. This had even extended to union representatives making sure that certain employees got to work on time.

5.2.5 Summary

Within the case-study organisations in our sample, there was a clear demarcation between the roles played by: companions; trade union representatives in non-union environments; and trade union representatives within heavily unionised settings within formal hearings

Most companions played a limited role within disciplinary and grievance hearings. In most cases they acted purely as a source of support and a witness to proceedings. At most they provided a check on the conduct of the hearing. However, given the vulnerability that companions appeared to feel one has to question whether they would have either the knowledge or the confidence to challenge management in the event of any procedural irregularity. According to our respondents it would appear that many employees are reluctant companions, concerned as to the implications of being associated with the dispute in question. Given the lack of status accorded to companions, it is hardly surprising that they did not have an impact on proceedings. The only cases in which the companions played a substantive role appeared to be when they were experienced and/or had a degree of procedural knowledge.

The role played by trade union representatives could hardly be more different. In unionised environments they fulfilled a number of different functions within the disciplinary hearing: supporter, advocate, and negotiator. Importantly in the majority of cases managers found the presence of union representatives helped to ensure that all issues were explored and that fair decision was reached. Furthermore, union representatives were able to manage the expectations of the member and in doing so help to create an environment in which a fair resolution could be reached.

Nonetheless, all managers (and union representatives) agreed that ability of a union representative to play a positive role within the hearing was conditional on the personality, experience and critically, their relationship with management. Where union-management relationships were poor, hearings tended to be more adversarial. This was particularly evident in relation to smaller organisations and those without a significant union presence. Here there appeared to be a mutual distrust and suspicion. Trade union representatives saw smaller employers as more likely to be heavy handed in dealing with discipline and grievance, while employers saw unions as obstructive and feared the broader implications of union involvement in their organisations. Consequently there tended to be less informality and a more defensive approach from both parties.

5.3. The impact of accompaniment and representation

5.3.1 Informality, trade union representation and disciplinary outcomes

As outlined above, non-union companions had little involvement in informal processes either before or during disciplinary or grievance proceedings. There was also limited trade union involvement in informal processes within organisations that did not recognise trade unions. In contrast, in unionised settings, trade union representatives were closely involved at a relatively early stage of most employee grievances and disciplinary situations. However, did this assist or hinder dispute resolution?

Not surprisingly the view of trade union representatives was clearly that their early involvement allowed them to work with their member and management to find some sort of resolution. Importantly this view was also held by operational and HR managers. Their impact appeared to be three-fold. Firstly, trade unions were able to identify problems at an early stage. Secondly, they were able to get to the root of potential disciplinary issues. For example an employee who is consistently coming in late might have a personal problem that they would be prepared to discuss with a trade union representative but not with a member of management. Consequently, the underlying cause can be identified and addressed. In general, management respondents agreed that union involvement at this point helped to resolve issues and moderate outcomes:

"I would say that we've got a relationship with most of the unions where they're quite helpful and they'll say to their member, 'Look, this is a reasonable way forward'. So I suppose that's another reason really why we would involve the trade union; it'll usually result in what we feel is a satisfactory outcome. So the employee is getting representation and we're usually getting the outcome that we want."

(HR Manager)

Thirdly, there was clear evidence of the union, together with management, attempting to warn employees of the consequences of their actions and helping them to avoid further problems. A senior manager in large unionised business explained that the unions were also able to challenge employee behaviour in a more direct manner reinforcing more formal management warnings.

"He's able to say, 'Look, you will get sacked. If you don't change, you are likely to...' You know I have to say in a way that that is very correct...they have the ability to speak on a different level sometimes and say, 'You're going to lose your job mate'...a TU rep. that they live and work with out there that they're going to trust as a mate can say, 'You'll get sacked'. I can't say that. I think that rings really true."

The power and legitimacy of that message coming from a trade union representative who is trusted and on the employee's side is a very powerful tool for changing behaviour. However the ability of managers and trade unions to work together in resolving these issues was very dependent on high levels of trust. According to a trade union representative in a public sector organisation:

"Because we have, I like to consider, a very good constructive working relationship with HR, with personnel, I'll certainly be aware if someone has been called in for an informal chat, so part of the role would be to go and have a chat with that person afterwards and say, 'well look, what's the situation here? What's happened? What's happened so far? ...let's try and sort this out because otherwise the next stage could be a, b and c in terms of formal disciplinary action."

However, as discussed earlier in this report there was a general feeling that such informal paths, while still important, were becoming more difficult to tread. The question, therefore, is whether accompaniment and representation can have an impact in the more formal stages of procedure.

5.3.2 Do companions make a difference?

Management respondents were asked whether accompaniment at a formal hearing made a difference to the eventual outcome. Where the companion was a work colleague, the general view was that they made little difference to the decision. According to an HR manager at a non-unionised organisation:

"Very, very rarely would a companion speak. Very rarely do they ask questions. We sometimes get occasions where we are having to stop them from speaking on behalf of the person who is actually attending the disciplinary hearing because sometimes they get a bit overexcited and want to answer the questions themselves or give examples of things that have happened to them so we have to sort of curb that, but in the main they sit, they feel very uncomfortable or they look to be very uncomfortable and they don't do a great deal."

On occasions when the companion had been articulate, confident and constructive, managers reported that they had prompted a thorough consideration of the issues. However, no examples were given where the decision had been shaped by the intervention of the companion.

There was a suggestion from some respondents that where non-union companions did take an active role they did not necessarily help their colleague's case. This was particularly so where the companion was a family member of the employee with little knowledge of the organisation. According to an HR manager in a large public sector organisation, companions provided moral support but:

"they usually end up getting their person who represents them into more trouble than they started off with because they're not aware necessarily of how the processes work. We get a number of people who read things on the internet and think that that must apply in all situations. They become sort of backroom lawyers without the knowledge that they need to do that kind of thing."

Non-union companions, within the case-study organisations, gave mixed reports as to their impact. However one who had some prior experience of HR issues believed that while she had not changed the decision of the employer she had changed the attitude of the colleague she had accompanied, persuading her not to leave the company:

"She was going to just leave; she had convinced herself she was going to get sacked, and she was just going to walk out and leave and just tell everyone exactly what she thought and just leave, but I convinced her that's not what going to happen; you're not going to get sacked; you've just been told off; you just need to be more reliable and just turn up on time and, you know, do a job in the meantime. It wasn't rocket science but she just had convinced herself into a frenzy that this was it, this was the red line; she was going to go."

(Companion)

Therefore it would appear that if non-union companions are to have any positive impact on outcomes, a degree of knowledge and experience is essential. Even then, as we have reported above, they face significant disadvantages in terms of confusion over their role and a lack of information.

5.3.3 Trade union representation at disciplinary and grievance hearings – does it matter?

We have already discussed the impact that trade union representation can have within informal processes of discipline and grievance resolution. However, it could be argued that by the time that an issue reaches a formal hearing the die is invariably cast. All respondents within our sample admitted that there were many cases in which no amount of argument would change the ultimate decision. However there was a view from both management and unions that good quality representation did have an impact.

At a basic level, the quality of the advocacy that a trade union representative can provide may be important. A public sector HR manager summed it up as follows:

"If the trade union rep is a fairly skilled advocate then it will be advantageous to the employee. If you have a totally naive or inexperienced employee who hasn't been in a formal situation and has no background in either the disciplinary procedure or maybe employment law and maybe has no understanding of, say, the concept of balance of probabilities then that's going to be difficult for him or her whereas an experienced or a talented trade union advocate will probably present a much better case and therefore could actually influence the outcome to the benefit of his or her member."

Therefore by being able to clarify issues and expose deficiencies in a case, trade union representatives can and do make managers think twice before deciding on a disciplinary sanction and particularly before dismissal. However, a number of managers argued that where representatives adopted too formal an approach (in the words of one manager, "acting like Kavanagh QC"), it could be counterproductive.

Managers also highlighted the fact that their decisions may be affected by new information coming to light during hearings, particularly in relation to mitigation. This was more likely to occur, they argued, where there was union representation.

"There are some guys that are very, very quiet who, during their career, you rarely have anything to do with them other than a good morning and how's things going and if those individuals end up in a position of a disciplinary then you don't know a lot about them in terms of their background, their family life, what goes on there, so union guys can help bring some of that out and try to paint that broader picture."

(Operational manager)

In some cases there was also scope for some informal contact between management and union representative during and/or between hearings. Adjournments were sometimes used to try and sound out possible resolutions or compromises and to clarify issues. A senior manager in a large unionised organisation gave the following example:

"Sometimes when we're in a disciplinary hearing, people break down; you know, we've adjourned because someone has broken down...during the adjournment it's good for me to say to [the union rep] or someone, 'Did he grasp that? Because I'm not sure that he did?' and if necessary I'll say to [the union rep], 'just go through that with him again. Does he understand that? If he doesn't we'd better bring him back in and go over it again, step by step'."

Managers cited a number of cases in which a realistic approach on the part of the trade union representative had been successful in winning a reprieve for their member. Rather than dispute all the evidence, union representatives would be more likely to encourage their member to own up to a misdemeanour and argue for leniency. It could be argued to be unlikely that unrepresented employees would have the confidence to take such an option. At the same time it was acknowledged that not all union representatives would adopt such a stance. Confrontational and argumentative approaches were less likely to succeed, according to management respondents.

Finally, while most respondents in unionised environments felt that unions played a constructive role, there was an acknowledgment from both managers and representatives that the relative strength of the union did have some impact in shaping decisions over disciplinary and grievance issues. This was not because of a threat of industrial action but because it could have a wider impact on management union relations. Nonetheless, the overwhelming belief amongst management respondents within unionised organisations was that union involvement moderated disciplinary outcomes through constructive attempts to resolve disputes.

In smaller and non-unionised environments within our sample, the impact of trade union representatives was much less clear. In most cases there was little relationship between employers and regional union officers who came into organisations to represent their members. Hearings therefore were more likely to be adversarial. Trade union respondents generally believed they had less chance of affecting outcomes in such circumstances through more constructive approaches and so relied on exposing potential legal irregularities and raising the possibility of employment tribunal claims.

5.3.4 Summary

Accompaniment and representation can shape disciplinary outcomes. Good relationships between operational managers, HR and union representatives underpin informal processes that allow for the early identification of problems and joint approaches to resolve them. Respondents within unionised settings were clear that this prevented certain issues from escalating and helped avoid formal disciplinary action and dismissals.

Even where informal action was not successful, effective representation also had an impact on management consideration of disciplinary and grievance cases. Experienced and articulate representatives were able to put procedural and legal arguments that individual employees and most companions would have little knowledge of. Moreover a constructive and realistic approach often ensured that all the facts surrounding an issue were considered and tended to generate more lenient decisions. However, while management respondents argued that most

union representatives were effective and constructive, this was not always the case. Where representation lapsed into confrontation, the outcomes, if anything were more likely to be unfavourable to the employee.

In limited circumstances, companions could affect outcomes, however this seemed to be conditional on the companion having a degree of knowledge and confidence to be able to advise her/his colleague and actively participate in the hearing. Where companions had little impact it was not necessarily their fault. They had no specific training for the role and many had limited knowledge of procedure or law. They were often not properly informed as to their role within hearings and rarely received any information regarding the case. Moreover, they were hamstrung by concerns, however hypothetical, that their involvement could have negative implications for them in the future.

5.4 Factors that shape effective representation in workplace discipline and grievance

5.4.1 Personal attributes – experience, knowledge and training

The data from this study suggests that the personal attributes and competencies of the representative or companion are vital in determining their impact on disciplinary outcomes. Consistently, respondents referred to the importance of having experienced trade union representatives. Experience was seen to provide a depth of knowledge of company procedures but also underpinned high trust relationships with both managers and union members. In particular experienced union representatives were seen as more prepared to deal with issues on an informal basis as opposed to simply defending members in an adversarial manner. A public sector HR Manager explained that he actively encouraged employees to seek union representation.

"I genuinely believe that's for the good of the employee who's sort of in trouble as it were but also for us as management it's better that they go in with an experienced union rep who will coach them through the process that we've got to go through. So it's helpful to both parties."

However the same manager as that quoted above also highlighted that experience alone is not enough. The personality of the representative or the companion can critically affect the outcome. A number of examples were given of representatives who adopted a confrontational approach. It was generally argued by management respondents and accepted by union respondents that such approaches were largely ineffective and in particular tended to cut off any possibility of informal resolution.

"It's not always experience; it's just sometimes on their outlook. I can think of a very experienced full time official who was very, 'I don't have any informal discussions about my members or without my members being there, so don't dare ring me up and try that because I won't get involved'. It was just his ideology..."

(HR Manager)

This was also accepted by union representatives. One regional officer argued that:

"...as a matter of course we [trade union officers] are very egotistical people because we're in it to win, and I have seen cases where members would have been better off not being represented by a bombastic egotistical shop steward or full time officer because it gets the company's back up."

Personality was also important in determining the effectiveness of non-union companions. Those that lacked confidence had little impact on proceedings while those that were assertive, but lacked the necessary experience and knowledge tended to generate a confrontational atmosphere not conducive to dispute resolution.

Clearly one crucial factor in relation to the effectiveness of individual representatives was training. Here there was a clear difference between trade union representatives and companions. Most trade union representatives had attended basic training that included representation in discipline and grievance. A number of more experienced representatives had attended a range of more detailed courses on employment law, discipline and grievance and advocacy. Companions for the most part had no training unless this had been provided as part of their normal work role.

5.4.2 Relations between parties – trust and partnership

The attitude taken by the representative or the companion may well reflect the nature of their relationship with other stakeholders and, in particular the line manager and HR manager/advisor. Within three of our case study organisations there were established partnership agreements between unions and management. This appeared to feed through into the handling of disciplinary and grievance situations. In particular it underpinned informal processes of dispute resolution. According to a shop steward in a large manufacturing company:

"We've got this partnership now between the trade unions and the management. We've got this partnership programme running and everybody is sort of pulling in the same direction. So if we can reach agreements with the management or the individual with the manager then we'd rather do that than be confrontational and I think that's just fed right through the company now and the lads realise that as well."

In another case, it was argued that work done by management and unions in developing a learning partnership had positive spill-over effects in dealing with workplace discipline and grievance issues.

Learning to trust – grievance and discipline in the public sector

Public sector organisations are often associated with lower rates of disciplinary sanctions, dismissals and employment tribunal applications. They tend to be highly unionised and deal with grievance and disciplinary issues in a highly formalised, quasi-judicial manner. However, they have experienced significant change in recent years with performance issues paramount. This was the case within one of our case-study organisations - a public sector body involved in the provision of transport services and employing over 900 employees.

The organisation had high union density and a number of different trade unions were recognised. Formal employee grievances and disciplinary issues were subject to detailed procedures that extended significantly beyond statutory minima including a final right of appeal to a sub-committee of the local authority. The HR department was currently centralised but is being moved to a business partner model. Their role in both grievance and disciplinary processes was to advise and brief the line managers who had primary responsibility for managing disciplinary and grievance issues.

The disciplinary policy and procedure was regarded as an opportunity to correct behaviour rather than to punish employees. The organisation was also developing an Absence Management Procedure in consultation with the trade unions. In certain parts of the organisation, the historic relationship with the trade unions had been more confrontational. More use is now made of informal solutions and improved communication and a more collaborative approach between managers, employees and the trade unions has facilitated this to some degree. Of particular significance was the development of a union-employer learning partnership that was seen to have significantly improved relationships. This was noted to have reduced the number of disciplinary and grievance cases within the organisation. Once the Absence Management Procedure is agreed managers and shop stewards will receive joint training on this.

Line managers were expected to try and resolve issues before triggering formal procedure. The organisation was trying to ensure that there is consistency in how line managers operated in relation to informal solutions since inconsistency at this stage could generate problems in relation to equity and litigation. Although more experienced managers were confident in their decisions and with the legal and procedural framework within which they operate, there was a tendency amongst some line managers to adopt a more formal approach and to defer to the HR department.

Representatives were seen to play an important role in bringing mitigating circumstances to the manager's attention or in encouraging the employee to do this. Having experienced trade union representatives involved was noted to make the management of the disciplinary and grievance processes more straightforward. Informal contacts between representatives and the HR department could also be useful in managing employee expectations and guiding them through the process. The trade union representatives were also able to outline to the employee the implications of the decisions that were taken. Employees were normally, but not exclusively, accompanied by their trade union representative. Where an employee chose not to be accompanied by a trade union rep and relied on a friend or relative, the HR Manager felt that the process had become more difficult and complicated because of the lack of experience and awareness of these companions.

Within our case-study organisations trust between union representatives and managers was central to constructive approaches to disciplinary and grievance situations. Where trust was absent managers resorted to more formal procedural routes while trade union representatives adopted confrontational attitudes. It was also shown that relationships that facilitate dispute resolution are built over time. According to an HR manager in a large organisation:

"I think the ability to talk informally depends entirely on the relationship that the manager has with the TU guy. If that underpinning relationship isn't one of trust where people can talk in a four-wall environment then I think it could be a recipe for disaster. The last thing you want is for a manager to disclose something or talk about something and then the TU to use it officially as a weapon against the manager because you'd only do that once and you won't do it again and the relationship is kaput. So I think the relationship is the key issue. If you've got the relationship there is freedom."

However there was that the changing nature and make-up of the HR function was placing a strain on such relationships resulting in a formalisation of processes. Under traditional models of personnel management, senior union representatives were used to dealing with specific personnel managers with whom they were able to build a good relationship. From the trade unions' viewpoint the move to a business partner model and even outsourced HR has disturbed these relationships in some places. For example when asked why he thought there was less use of informal processes in discipline and grievance a trade union representative gave the following response:

"One time you had a personnel department that sat over the whole site so you were dealing constantly with the same people...whereas now it's split up...you've got different HR people there, different managers. So consequently, you're going into hearings with totally different HR people all the time. Sometimes it may be the first time you've met them and you haven't got that feeling of...I wouldn't say confidence but you certainly don't feel as sure as you would be with somebody that you know."

In addition a number of respondents pointed to the changing composition of HR departments. Whereas, in the past personnel managers would have often come from within the organisation, HR advisor roles were increasingly occupied by younger, relatively newly qualified, staff. Many of these advisors had made conscious attempts to develop relationships with trade union representatives, but this was not always easy. A senior shop steward admitted:

"that in itself might be a daunting experience for some of them and if they get one of our more bolshie TU reps, they might think, I don't want to do that again. So it cuts both ways perhaps that, but the company does encourage them to do that and I've had a few new recruits to HR who have rung me up and said, 'Can I come and talk to you?' "

It was also noticeable that in companies which did not recognise trade unions and in which regional officers came in to represent members, there was little trust between the parties and hence disciplinary and grievance matters were handled in a much more adversarial and formal way. One regional officer explained that

he was not always welcomed by smaller employers. This then shaped his attitude when attending hearings.

"generally these people have no experience, and they see me as the big bad union guy, and 'I'm not going to be dictated to by this big bad union man', and I can be... it depends on the reaction I get from the person I'm dealing with. I can be so nice and so reasonable, or I can be over the table at them".

Non-union employers that we interviewed had little experience of trade unions and perceived them as militant and a threat to stable employee relations. They tended to think that trade union representatives were there to 'catch them out' rather than resolve disputes.

"I'm not a fan of Trade Unions and it's only my perception. I don't know about them. I've not read up on them but my perception is that they're very, very militant and cause more trouble than they help."

(HR Manager)

However, union respondents cited examples of non-union employers coming to accept that trade unions could be useful in dealing with difficult and sensitive disciplinary situations. However, in these cases the representatives had had to work hard to establish their credibility. A trade union officer described his relationship with an organisation that steadfastly refused to recognise trade unions:

"I'm a bit more lenient when they fall off from following the procedures, and I would bring them back in line easily... I don't want to upset the managers, and it's a case of building bridges or working relationships. Like I said before, disciplines and grievances are not the places to bang your fist, or win; it's negotiations...In my experience, such as at [name of company] they tend to welcome me in to disciplines, knowing full well that the discipline will run smoothly, the arguments will be understandable and also explanations will be given to the member from the union point of view."

Overall therefore the effectiveness of representation in facilitating dispute resolution is critically dependent on the quality of the relationships between employee representatives, operational management and HR.

5.4.3 Organisational contexts

Workplace and workforce characteristics have long been seen to have an impact on disciplinary outcomes. However to what extent do they shape the nature of employee representation?

Workplace size would seem to have some effect. Larger workplaces within our sample had strong representative structures which were seen to play a key role in dispute resolution. In smaller workplaces representation played no role in informal dispute resolution. Problematically, when formal processes were invoked, the close relationships between employer and employee made disciplinary and grievance issues intensely personal. In this context it was very difficult for companions to play an effective part in the process. Furthermore as we have

outlined above, smaller organisations often felt vulnerable in the face of trade union involvement, which led them to take a fairly defensive stance against employee representation and retreat behind the cover of formal procedure.

Sectoral factors were also important in certain respects. Public sector organisations in the sample had particularly formal, almost quasi-judicial, procedures. This somewhat restricted the potential for informal resolution and shaped the role of the representative. Nonetheless, relatively good relationships between trade unions and senior managers meant that representation was valued and encouraged and representatives played an active part in disciplinary and grievance processes. The type of industrial activity of the case-study organisation seemed to be less important, within our sample, than the level of unionisation within the organisation. As argued above, it was the quality of the relationships as opposed to the industrial environment that were critical in shaping how representation impacted upon disciplinary and grievance outcomes.

Among the case-study organisations, the gender composition of the workforce did not appear to have a noticeable impact on the effectiveness of representation. Within those organisations that were more ethnically diverse, there was a particular need for accompaniment and representation where language barriers were a problem. This in itself did not necessarily help matters. In one instance a companion who was also acting as a translator began to answer questions without translating them for his colleague.

"I actually asked a question and it was quite clear that he hadn't understood the question and the guy just jumped back and answered me. I was like, 'hang on a minute, you're not here as the employee. He's not answered and you've not translated it. You're trying to answer the question. Stop right here'. I actually adjourned at that point and said, 'Enough is enough. You need to take five minutes and you need to calm down and you've got to be aware that you are not the employee. You are not the one that's in the disciplinary'."

(Operational manager)

The most important compositional factor appeared to be age. This had an impact in two main respects. Firstly, within two of the case study organisations, the age profile of the workforce was relatively high. As a consequence, trade union representatives were well established and had considerable experience. Similarly their members tended to have long service. Consequently, there appeared to be fairly close relationships between trade union representatives and their members. This in turn helped in resolving disciplinary and grievance issues, in that, union representatives tended to know their members and thus were able to explore the background when problems flared. Secondly, a number of the case studies had particular disciplinary problems with younger workers and apprentices. In unionised environments this tended to be dealt with by a concerted joint effort between management and union representatives in an attempt to deal with problems at an early stage.

"We have two reps that are apprentice reps. They meet every month and they're close to the apprentices. Especially when they're coming from school, it's a big change to them and we do have problems with some of them and sometimes the manager will have a word with us and HR will have a word and we'll go and speak to the individuals themselves. A lot of the time that works."

(Trade union representative)

5.4.4 Legal obligations

The introduction of the right to accompaniment at disciplinary and grievance hearings was aimed to protect individuals facing disciplinary action or who wished to make a complaint. In short it was designed to improve the representation of employees' interests.

In case-study organisations without organised structures of trade union representation, the right to accompaniment had been important in the sense that the opportunity to be accompanied was now routinely offered to employees. The notable change in these settings was that the legislation forced organisations to provide for accompaniment by trade union representatives for the first time. It is unlikely that non-union organisations would have extended accompaniment in this way without statutory compulsion.

However, the extent to which the right to accompaniment has improved the effectiveness of representation is questionable. As we have pointed out above the evidence within our sample suggests that the impact of companions (as opposed to trade union representatives) is negligible. They are largely treated as observers by employers and few are able to do any more than offer moral support and observe proceedings. But there was a sense within non-union organisations that they would value companions who were able to offer a substantive point of contact for management when dealing with disciplinary and grievance issues. This manager argued that companions would be valuable if they were properly trained and 'intellectually equipped'.

"If a company like ours had two or three trained employees that just were trained to be companions and that were available to ensure that the employee got a fair and proper hearing, that would be invaluable because number one, it would make our first line managers a lot more savvy really; it would just make them [line managers] better at what they do, and it would make sure that they don't cut corners."

In organisations with established trade unions, the right to accompaniment was of little relevance save for providing a base-line for the scope of representation within hearings. In practice most of the unionised establishments went beyond the statutory minima and were happy for trade unions to fully represent rather than simply accompany their members.

Overall, therefore, the right to accompaniment provides a basic entitlement and ensures that employees can, at the very least, be supported within disciplinary and grievance hearings. The importance of this should not be under-estimated. However, as it stands, and given the difficult context within which non-union companions find themselves, it does little to ensure a level of representation that can help to moderate disciplinary outcomes.

5.4.5 Summary

It could be argued that the effectiveness of representation is simply a function of workplace or workforce characteristics. In sum, representation is effective, but only in larger, unionised organisations. While the nature of the organisation is undoubtedly influential, our findings point to the overriding importance of high-trust relationships between representatives and managers. Where this is evident, there is a constructive approach to discipline and grievance and informal processes of resolution are widely used and effective. Where it is absent managers inevitably fall back on formality and procedure to ensure legal compliance. We would argue that this would apply irrespective of workplace size or sector.

Furthermore, if companions and/or representatives are to have an impact in moderating disciplinary outcomes, experience, training and knowledge of procedural knowledge are vital. These attributes allow representatives and companions to get the best result for the employee and also underpin constructive approaches to disciplinary and grievance issues.

6. CONCLUSIONS

In their study of WERS2004, Saundry and Antcliff (2006) argued that broader patterns of workplace representation may be an important factor in moderating disciplinary outcomes. They also argued that the right to accompaniment at disciplinary and grievance hearings and procedural formality had little impact. This report provides a glimpse of the reality that lies beneath that statistical analysis. It is important to be cautious about giving undue weight to these findings. They are based on a small sample of organisations and therefore cannot be seen as representative. Nonetheless the consistency of the evidence allows us to draw tentative conclusions and sets out an agenda for further research.

The findings underline the importance of informal processes in resolving disputes. Most respondents believed that it was preferable to deal with grievance and disciplinary issues informally, wherever practicable. Moreover such processes were widely used within most of the organisations within our sample. However, informal routes to dispute resolution were under increasing pressure. To some extent, this lends support to the conclusions of the Gibbons Review (2007) and its consequent recommendations to government. However we found little evidence, within our sample, that formalisation had been driven by the introduction of statutory dismissal and grievance procedures (Harris et al., 2008). In contrast the threat of falling foul of what was perceived to be an increasingly complex web of legal obligations was causing some managers to retreat to the protection of formalised procedure (see also Harris et al., 2008 in respect of SMEs). This was exacerbated to a certain extent in larger organisations by the changing nature of the HR function which was linked to a more process driven approach to discipline and grievance. Therefore, whether the repeal of statutory disputes procedures and a lighter touch approach to regulation will halt the drift away from informal process of dispute resolution is questionable.

Importantly, our findings support the argument that trade unions can play a key role in moderating disciplinary outcomes (Edwards, 1995). Within unionised organisations in our sample, representatives were central to informal processes of dispute resolution, before, during and after the onset of formal procedure. They acted as an early warning system, a channel of communication and even as an additional arm of management in trying to ensure that unacceptable behaviours were corrected. However, this was crucially dependent on the nature of the relationship between trade union representatives, operational management and HR advisors and managers (Edwards, 2000). Informal processes were predicated on trust and, in turn, trust was often based on relationships developed over time. Where time was taken to invest in these relationships, informal processes were effective in minimising disciplinary and grievance processes. But where relationships were kept at arms' length, formality and inflexibility hampered dispute resolution.

In the absence of structures of union representation, informal processes were conducted between managers and employees. While this can be effective, the lack of a representative to act as a confidante and conduit between the employee and manager arguably makes informal resolution more difficult. Furthermore, without effective representation, informal processes may expose asymmetries of power between manager and employee putting the latter in a distinctly vulnerable position. Companions in the non-unionised environments within our sample were

not involved until formal disciplinary or grievance hearings and we found little sign of the companion role developing into one offering broader representation. We found that informal contact between managers and external trade union representatives in such environments was also rare. Employers sought to minimise the role and influence of trade union representatives, who were generally perceived as a source of conflict and obstruction. In these settings, trade union involvement did not facilitate informality but tended to lead employers to seek the protection of formal procedure. Where trade unions did play a positive role in non-union environments and smaller organisations, trade unions and employers had been forced to work hard to establish credibility and overcome mutual suspicion.

Within formal stages of disciplinary and grievance procedures, the degree to which accompaniment was seen as effective (in terms of the employee) and constructive (in the view of the employer) depended once again on the quality of relationships between companions and representatives and managers. It was also linked to the nature of the individual companion. In general union representatives were seen by managers in unionised organisations as playing an important and constructive role, both in ensuring a fair outcome and in managing the process. In some instances this extended to unions reinforcing the implications of warnings made by management. The independence of unions and their relative legitimacy in the eyes of employees was a crucial ingredient within this. In short, good union representation within unionised environments moderated disciplinary outcomes. The minority of representatives who were seen as unduly confrontational were perceived by both management and union respondents as being less effective as a result.

In non-unionised environments and particularly smaller organisations the picture was very different. While managers welcomed the idea of a companion to provide support and ensure fairness, most companions played no more than a marginal role within disciplinary and grievance hearings. Consequently, accompaniment of this type was seen to have little impact on outcomes and made no significant contribution to dispute resolution. There were three main reasons for this. Firstly non-union companions were treated by most employers as observers. They were not always provided with details or documentation prior to the hearing and were often not clearly briefed on their role within the hearing. Companions themselves had limited awareness of their legal rights. Where companions were provided with information by employers, this tended to underplay their role as currently set out in statute. Secondly, they rarely had sufficient training or knowledge of the process to be able to challenge managements' handling of the process in an effective way. Indeed, a number of management respondents felt that companions could have a negative impact on the eventual outcome. Thirdly, non-union companions, without the independent status of a union representative, were often in an invidious position in challenging managers who were also often their own line managers.

While the non-union employers in our sample welcomed the notion of effective representation, the presence of trade unions at disciplinary and grievance hearings was viewed with concern (see also Forth et al., 2006). Trade union respondents argued that it was possible to develop good relationships with some small and non-union employers. Within our sample, however, non-union employers had little trust in, or contact with, trade union representatives. At best, trade union representation ensured that employers adopted followed fair

procedure. But, generally, their presence tended to formalise proceedings with both sides adopting defensive and adversarial positions. This is not a criticism of either employer or trade union, but merely serves to reinforce the point that effective handling of disciplinary and grievance issues must be underpinned by high-trust relationships.

As pointed out above, one must be careful about drawing firm conclusions from a small-scale study. Nonetheless, our findings provide useful insights relevant to the ongoing policy debate. The inevitable message from our research, to date, is that strong structures of employee representation underpinned by high-trust relations are critical in minimising disciplinary sanctions and dismissals. They are particularly important in ensuring that employees are not disadvantaged within the informal processes which facilitate effective dispute resolution. Such relationships cannot be created by governmental intervention and legislation. Indeed the issue of employee representation in the large number of workplaces with no trade union presence is particularly problematic.

However, the government and other stakeholders can create a context within which the importance of workplace representation within dispute resolution is acknowledged and promoted. In this light the recent tri-partite initiative between the CBI, TUC and BERR to highlight the positive role that trade unions can play in UK workplaces is an important development (BERR, 2008b). Unfortunately that stands in stark contrast to recent deliberations over dispute resolution, which have largely ignored the role of representatives and companions.

We would argue that advice and guidance for employers on discipline and grievance (including the Acas Code of Practice) needs to reinforce the positive formal and informal role that employee representatives and companions can play in dispute resolution. Furthermore, more detailed advice and information needs to be provided to companions regarding the extent of their role and also their right to reasonable paid time-off. Our findings also support calls from Acas (in their response to the government's review of dispute resolution) for improved skills and training for companions, employee representatives and line managers in relation to disciplinary and grievance issues. This is particularly the case for those working within smaller organisations.

This report has begun the process of uncovering the reality of workplace discipline and grievance and the role of representation within processes of dispute resolution. It has also underlined the importance of a more detailed programme of research to establish whether the themes uncovered within our sample of organisations are reflective of UK workplaces as a whole. In particular there is a need to examine dispute resolution within smaller unionised establishments and larger non-unionised workplaces with alternative systems of employee representation. Furthermore, this report has noted the importance of relationships between line managers, HR managers and employee representatives. The way in which these different stakeholders interact in dealing with disciplinary and grievance issues is a key area for further investigation.

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