

EMPLOYMENT NEWSLETTER



Welcome to our July employment law newsletter, helping employers ensure they remain up to date on legal changes and best practice.

In our [April](#) newsletter we looked at the key components of a disciplinary policy. In this edition we explore the importance of conducting a fair investigation.

With increased use of AI we also consider best practice when faced with an AI generated grievance.

Finally, we also review the disability discrimination case of [Cunningham v BBC](#) and what you, the employer, can learn from the BBC's mistakes.



The importance of a fair investigation

With unfair dismissal rights changing, more employees will have the right to claim from 1 January 2027. To successfully defend a claim for unfair dismissal you, as the employer, need to show:

- There was a fair reason to dismiss e.g. misconduct, capability, redundancy, statutory restriction or some other substantial reason.
- It was fair and reasonable for you to dismiss for that reason in all the circumstances.

For misconduct dismissals a tribunal will look at the whole process followed when considering fairness, including any investigation undertaken. Conducting a fair and balanced investigation is vital. Whilst what counts as a reasonable investigation will always be fact specific, we highly recommend that you:



- Appoint an appropriate investigator. This should be someone independent and not previously involved. Independence protects the integrity of the process and strengthens your position if challenged. Ideally this should not be the same person who will then oversee any disciplinary meeting deciding what, if any, disciplinary sanction should follow. We appreciate, however, this is not always possible for smaller employers, especially when you also need to ensure you have someone available to handle any appeal.
- Ensure all key witnesses and the employee are interviewed. Unless the employee readily admits the misconduct, it will be important for the investigator to identify key witnesses and speak with them, as well as give the employee the opportunity to respond to the allegations as part of the investigation before reaching any conclusions.
- The investigation process should always be a fact-finding exercise, not a witch-hunt. Look for evidence that could both clear the employee as well as establish guilt. The more serious the misconduct the greater the need for a thorough investigation, especially where dismissal could be a potential outcome.
- Record all evidence gathered and findings clearly. At the end of the investigation the investigator should provide a report outlining their key findings and how they were reached. This report will then be used to decide whether any disciplinary proceedings should follow under your disciplinary policy. Where it is one employee's word against the other, if there are reasonable grounds to accept the recollections of one over the other and the investigator can explain their reasons for doing so, they can.



A prime example of what not to do can be seen in the case of Borg-Neal vs Lloyds Banking Group Plc. There the employee's actions, namely the use of a highly offensive word during a race education training session, was significant enough to potentially justify dismissal for gross misconduct. However, the dismissal was found to be unfair.

Whilst not the only reason for holding the dismissal unfair the tribunal was critical of the investigation undertaken by the employer bank. The investigator did not speak to the trainer who had conducted the session or two other trainers who had been present. They only spoke with the founder of the training company who had not actually attended the training session themselves! Further despite there being over 100 people at the training, they only spoke to one attendee, four months after the event. Unsurprisingly, the tribunal did not consider this a reasonable investigation.

If you do happen to get the investigation process wrong, don't fret. Errors can be corrected during the disciplinary or even appeal stages provided appropriate guidance is sought early enough. Our HR Support Service and employment law teams are here to help.

Don't let AI-generated grievances tie you up in knots

Artificial intelligence is rapidly changing the workplace and one emerging challenge for employers is the AI-generated grievance. Increasingly, employees are using AI to draft complaints. While these can appear polished and formal, they often create practical and legal complications for you, the employer, handling them.

From an employment law perspective, the core issue is that AI can produce documents that look authoritative but may currently be unfocused, incomplete, or misleading. They therefore require a more considered and structured approach.





What makes AI-generated grievances different?

AI-generated grievances tend to share several common characteristics:

1. Excessive length and volume

AI tools often produce long, detailed narratives. Employees may include:

- Peripheral background information
- Historical complaints not previously raised
- Generalised workplace criticisms

This can obscure the core issue the employee is really seeking to raise.

2. Lack of focus on actionable issues

Because AI relies on the information provided, grievances may:

- Miss the key legal issue (e.g. discrimination, whistleblowing)
- Fail to identify specific incidents or individuals
- Blend multiple unrelated complaints together

3. Inaccuracies or assumptions

AI may:

- Fill gaps with generic wording
- Make assumptions not grounded in fact
- Introduce legal terminology incorrectly

This can create confusion about what the employee is genuinely alleging.

4. Inflated tone or legal framing

AI-generated content often adopts a formal, quasi-legal tone, sometimes:

- Escalating minor issues into serious allegations
- Referencing “constructive dismissal” or “harassment” without substantiation

Key risk for you, the employer

The main legal risk is misidentifying the real grievance, wrongly focusing on irrelevant detail or failing to identify a core complaint e.g. discrimination. Not only does this risk missing an opportunity for early resolution, you also risk inadvertently breaching the ACAS Code of Practice for disciplinary and grievance procedures which risks an uplift in compensation (of up to 25%) should the employee pursue a successful tribunal claim.

How should you, the employer, respond?

Treat the grievance as a starting point. Do not assume everything included is relevant or that its structure reflects the employee's real concerns. Instead step back and ask:

- What are the actual complaints being made?
- Are there any legal allegations (e.g. discrimination, bullying, whistleblowing)?
- What are the key incidents and dates?

You should then meet with the employee to clarify their grievance with them. This is vital. Ask the employee at this meeting to summarise their concerns in their own words and what their desired outcome is. For example, you could say: "Your written grievance raises a number of points. It would be helpful if you could talk us through the main issues you would like us to investigate."

Ultimately it will be important to identify and address the real complaint to ensure not only that the employee feels heard but also to reduce the risk of procedural unfairness and claims. Clarifying the real complaint will also help narrow the scope of the investigation to follow. Avoid getting drawn into irrelevant historic matters and generalised dissatisfaction.

Where AI introduces legal terminology (e.g. harassment, discrimination) do not dismiss it. Investigate the facts, to test whether they support the label, seeking legal advice if you are unsure or are concerned a potential claim could follow, justified or not.

Finally, make sure you keep a clear audit trail:

- Document how you interpreted the grievance
- Keep notes of matters discussed at all meetings, especially the clarification sought, and response received
- If anything in the written grievance is not investigated, document why

Handled correctly, AI-generated grievances need not increase risk. They do, however, require a more structured, thoughtful approach. For those needing further guidance, do not hesitate to get in touch.

Cunningham v BBC – At what point is an employer on notice of a disability?

The facts

Ms Cunningham had worked for the BBC since 1987 as a television presentation announcer / director. Her work involved varying shifts, including early morning and late-night shifts. In 2023 she made the BBC aware that she had been diagnosed with type 2 diabetes and fatigue. She was signed off work and referred to occupational health (OH) at that time. The OH report received advised that Ms Cunningham's health was likely to improve with appropriate treatment.

Whilst signed off work Ms Cunningham asked for adjustments to her shift pattern referring to her diagnosis and commenting "...which is, I'm sure you are aware, classed as a disability?" Certain adjustments were agreed including the removal of 5am start early shifts and certain late shifts finishing at 3am. One late shift, finishing at half past midnight, remained.

In August 2023, following a further OH referral, OH advised that Ms Cunningham should not be working shifts ending on or after midnight. This followed an incident during such a late shift in June 2023 where Ms Cunningham had made a broadcast error resulting in her being 45 seconds late starting a 60 second live news broadcast.

Disciplinary proceedings were instigated but ultimately no formal disciplinary sanction imposed. Nonetheless Ms Cunningham found the whole process upsetting, prompting her to pursue a claim for failure to make reasonable adjustments and discrimination arising from her disability.

The tribunal's decision

To succeed with her claims Ms Cunningham not only had to show she was disabled for the purposes of the Equality Act 2010, but also that the BBC knew or ought reasonably to have known this at the time of the events she was complaining of, so between June and August 2023. Basically, a lack of knowledge of disability can be used as a defence to discrimination claims. The BBC sought to rely on this defence.

Whilst ultimately accepting Ms Cunningham was disabled as of June 2023 on account of her type 2 diabetes, the tribunal initially found that the BBC only became aware of this in December 2023, so after the events complained of, when OH advice expressly confirmed Ms Cunningham's disability. The claims were therefore dismissed on the basis the BBC did not have the required knowledge when it mattered. Some claims were also dismissed on other grounds.



The appeal

Ms Cunningham appealed and was successful, with some of her claims now having to be reconsidered by the tribunal.

Of relevance to the decision of the employment appeal tribunal (EAT) was the fact that as of June 2023 the BBC were already aware that:

- Ms Cunningham had been diagnosed with type 2 diabetes.
- Diabetes is known to be a long-term, not a temporary condition, even if it can be controlled by diet.
- It was substantially affecting her both in and outside of work due to the exhaustion she was experiencing.
- The OH reports obtained, whilst not expressly stating that Ms Cunningham was disabled, referred to the diabetes being “under regular monitoring” and to the fact it “can often take a number of months to evaluate the effects” with “a possibility that medication may be required at some point in the future”. They also referred to the need for “reasonable adjustments” such as shift changes and regular meal and rest breaks to ensure symptoms did not worsen.

Basically, the BBC knew Ms Cunningham was suffering more than a minor or trivial adverse effects from the diabetes and were held to have constructive knowledge of her disability. Ultimately, if they were unsure they should have made further enquiries with OH. They did not do so.

Therefore, the EAT determined that any reasonable tribunal would have found that the BBC knew or should have reasonably known Ms Cunningham was disabled as of June 2023, even if the OH reports at that time did not expressly state this.



Takeaway for employers

You cannot avoid liability by claiming you did not know an employee was disabled if the information available to you strongly suggests you should be asking the question, could they be?

You do not need a formal diagnosis or formal statement from a medical professional confirming disability to have constructive knowledge. Early legal advice should be sought if it is clear to you that your employee is:

- Suffering from an impairment
- That is having more than a minor or trivial impact on them
- That this impact could potentially be more than short term

Our HR and employment law teams can guide you through this tricky area helping ensure you put in place the right support for your staff and avoid claims.

HOW CAN WE HELP?

Between our HR Support Service and Employment Team we can help with a variety of employment concerns, including any issues or needs relating to the content of this newsletter. Our HR and employment teams have a proven track record when it comes to helping employers:

- ensure their contracts and policies are legally compliant
- successfully navigate employee grievances and disciplinary proceedings, including harassment and discrimination complaints
- Help businesses get their duty to make reasonable adjustments right, avoiding claims
- robustly defend their position in the event of tribunal proceedings

Our HR Support Service clients also benefit from regular legal updates, access to experienced HR professionals as and when needed, along with preferential hourly rates when support is required from our experienced employment lawyers, as well as employment disputes insurance cover. You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.



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