

Dealing with Grievances

The Legal Framework

Understanding the Statutory Grievance Procedure

Introduction

The introduction of the statutory grievance procedure on 1 October 2004 meant that, for the first time ever, employers and employees were obliged to comply with a minimum statutory procedure when dealing with employee grievances. Prior to this, employers and employees had had to follow the guidance set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures rather than a statutory procedure.

This briefing note is written with the aim of assisting HR professionals and managers to deal with grievances raised by employees. It summarises the legal framework which applies when dealing with employee grievances covering both the statutory grievance procedure and case law in this area.

Employer should also be aware that to coincide with the introduction of the new statutory grievance procedure, ACAS revised its Code of Practice on Disciplinary and Grievance Procedures. The Code has not got the same legal status as the statutory procedure meaning that a failure to follow any part of the Code does not, in itself, make an employer liable to legal proceedings. However, employment tribunals will take the Code into account when considering relevant cases.

Geldards LLP also has a briefing note which provides practical guidance to employers on the steps required when dealing with employee grievances.

This briefing note covers the following areas:-

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The standard and modified statutory grievance procedures are set out in full in the Appendix to this Briefing Note.

1. The Importance of Dealing with Grievances Correctly

In order to understand and appreciate the importance of dealing with employee grievances properly, it is useful to understand what potential claims can arise when an employer gets it wrong.

1.1 Claims which can form the substance of a grievance

An employee who raises a grievance may well have a legitimate issue or concern which, if not addressed, could give rise to the employee seeking to take legal action against his/her employer. Where an employee raises the matter as an internal grievance, this can give the employer an opportunity to remedy any problems before the employee gets to the point of issuing proceedings. Where an employee has a legitimate potential legal claim, dealing with it through an internal grievance procedure can also offer an employer a route to reaching a compromise with an employee.

Examples of some of the types of grievance which may give rise to legal action could include complaints about:-

- discriminatory behaviour towards an employee based on gender, race, disability, sexual orientation or religious or similar beliefs;
- non payment of a bonus;
- unlawful deduction of wages;
- failure to supply health and safety equipment;
- harassment and/or bullying;
- changes to the role without the employee's consent;
- entitlement to holiday pay; and
- issues around working hours and rest breaks.

This list is not exhaustive.

It is worth noting that there is a practical, as well as a legal advantage to dealing with an employee's grievance well, through giving due consideration to the employee's concerns and trying to resolve the matter to the satisfaction of all parties involved. If an employee feels that his/her employer has done this, the employee may well be less inclined to become embroiled in litigation notwithstanding that he or she may have a potential legal claim.

1.2 Claims relating to the manner in which a grievance is handled

The manner in which an employer deals with a grievance can, of itself, also give rise to potential litigation, including the following main types of claim:-

- **constructive unfair dismissal** – an employer's failure to address a grievance can, of itself, be a breach of the employer's contractual duty of trust and confidence to the employee. This was confirmed in the case of *WA Gould (Pearmark) Ltd v McConnell*.¹ As such a breach is considered to constitute a fundamental breach of contract, the employee would be entitled to resign and claim constructive unfair dismissal.
- **discrimination** – the employee may argue that the employer would have dealt with the grievance differently if he/she had been of a different gender, race, sexual orientation, had different religious or similar beliefs or was not disabled.
- **personal injury** – if an employee suffers from a well recognised psychiatric illness or some physical ailment as a direct result of an employer's discriminatory handling of a grievance or an employer's breach of trust and confidence, the employee may also be able to sue the employer for damages for personal injury.

2. The Statutory Grievance Procedure

2.1 Background

The statutory grievance procedure was introduced in The Employment Act 2002.

In fact there are actually two procedures: a standard procedure and a modified procedure, as well as some general requirements which apply to both the statutory grievance procedure and the statutory dismissal and disciplinary procedure. The modified procedure only applies in limited circumstances after an employee's employment has ended. This is described in more detail below (see section 2.3 below).

The standard and modified statutory grievance procedures are set out in full in the Appendix to this Briefing Note.

Essentially, the **employee's** main obligations under the standard statutory grievance procedure are:

- to set out his/her grievance in writing;
- to inform his/her employer of the basis for the grievance;

¹ [1995] IRLR 516

- to take reasonable steps to attend a grievance meeting arranged by his/her employer; and
- to appeal if dissatisfied with the decision

whilst the **employer's** main obligations under the standard statutory procedure are:

- on receipt of an employee's written grievance, to invite the employee to a meeting to discuss the grievance
- to hold the meeting at a reasonable location and time;
- to allow the employee to be accompanied to the meeting;
- to rearrange the meeting in certain circumstances;
- to allow the employee to explain his/her case at the meeting;
- to notify the employee of the decision following the meeting;
- to notify the employee of his/her right to appeal;
- to hold an appeal meeting with the employee if requested, which should be conducted by a more senior manager;
- to inform the employee of the final decision; and
- to ensure, so far as reasonably practicable that the process is not subject to any unreasonable delays.

2.2 When does the statutory grievance procedure apply

The detail of when the procedure is triggered and must be followed by employers is contained in the Employment Act 2002 (Dispute Resolution) Regulations 2004 (the "Regulations")².

(a) What is a Grievance?

A grievance is defined in the Regulations as:

"a complaint by an employee about action which his/her employer has taken or is contemplating taking in relation to him/her".

² SI 2004/752

(b) Potential Legal Claims

The Regulations expand upon this and state that the statutory grievance procedure must be followed where such a grievance is in relation to:

“any action by the employer which the employer has taken or is contemplating taking, that could form the basis of a complaint by the employee to an Employment Tribunal.”

Essentially then, the application of the statutory grievance procedure is linked to whether or not an employee could have a potential legal claim to an employment tribunal.

In practice, when faced with a grievance submitted by an employee, it will be very difficult for an employer to have any idea of whether or not the employee has a potential claim, at least not without first hearing what the employee has to say about it. Geldard LLP's advice is therefore that a grievance should always be dealt with under a formal grievance procedure which incorporates the requirements of the statutory grievance procedure unless:

- one of the exceptions set out below in section 2.4 of this briefing note clearly applies; or
- it is very clear that the grievance is trivial or fallacious.

(c) Set out in writing

Under the standard grievance procedure, the employee must: *“set out the grievance in writing and send the statement or a copy of it to the employer”* whilst under the modified grievance procedure the employee must *“set out in writing, (i) the grievance and (ii) the basis for it and send the statement or a copy of it to the employer.”*

The early cases on the statutory grievance procedure have focused on what type of communication from an employee complies with these requirements. The cases referred to below all concern the issue of whether the employee's claims should be struck out on the basis of the employees' having not submitted internal grievances prior to issuing proceedings. This requirement, which was introduced at the same time as the statutory grievance procedure, is explained further in section 2.5(a) below.

The first of these cases was *Poat and Lake v Thorpe*. In this case, the two employees, Mr Poat and Mrs Lake, worked as Estate Manager and House Manager of Edgeworth Manor, a country house owned by Mrs Thorpe. Fed up with their jobs, the employees faxed lengthy letters of resignation to their employer detailing what the EAT later described as a “litany of complaints” and mentioning in particular “regular deposits by the Thorpe's puppies” which in the employees' view created an unhygienic working environment.

When Mr Poat and Mrs Lake brought proceedings for constructive dismissal against Mrs Thorpe, she argued that the cases should be struck out on the grounds that the employees had failed to first submit statutory grievances.

Mrs Thorpe's first argument as to why the letters of resignation should not be treated as grievances, was because the employees' letters of resignation had not been submitted to her in accordance with her established written grievance procedure. Her second argument concerned the employees' intentions. She contended that when the employees had set out their complaints in the letters of resignation, they did not do so in order to seek an internal resolution of the issues and had no intention of initiating the employer's grievance procedure.

The EAT rejected Mrs Thorpe's arguments and held that the requirements under the statutory grievance procedure are minimal. Specifically the EAT held that a written complaint need not say that it is a grievance in order for it to be treated as such, nor is there any requirement that an employer's written grievance procedure be followed.

The reasoning from the *Poat and Lake case* was followed in the case of *Shergold v Fieldway Medical Centre*. In this case, the letter of resignation of the employee, Mrs Shergold, indicated that she was leaving because of bullying. Her employer met with her to discuss the complaint, but no resolution was achieved. The employer therefore accepted the resignation and Mrs Shergold's employment duly came to an end.

When Mrs Shergold brought a case of constructive unfair dismissal against Fieldway Medical Centre, the employer argued that she had failed to comply with the requirement to submit a grievance. The tribunal accepted this argument and struck the case out. On appeal to the EAT however, the letter of resignation was held to be a grievance even though it was very brief, and unlike in the *Poat and Lake case*, did not even contain details of the employee's complaints.

(d) Solicitors' Letters Before Action

The case law also demonstrates that employees themselves do not need to write statutory grievances. In *Aspland v Mark Warner Ltd*, a solicitor's letter before action was held to be a statutory grievance.

Mrs Aspland was employed by Mark Warner. She had made a previous, successful discrimination claim against Mark Warner but subsequently felt aggrieved by Mark Warner's public support of the individual about whom she had complained. The solicitor who represented Mrs Aspland in the original claim wrote to Mark Warner's

solicitors setting out her complaints and asking the company to take certain steps in order to enable her to remain in its employment. When Mark Warner did not take these steps, Mrs Aspland resigned and claimed constructive unfair dismissal.

The tribunal held that the fact that the solicitor's letters to Mark Warner's solicitors were letters before action and did not expressly refer to invoking the internal grievance procedure, did not mean that they could not also amount to a statutory grievance. Mark Warner appealed, but this was dismissed by the EAT on the grounds that it made no difference that the letters were written by Mrs Aspland's solicitor rather than by her personally.

Another case dealing with solicitors' letters before action is the EAT case of *Stewart & anor v Arnold Clark Automobiles*. This case largely follows the earlier cases, but specifically confirmed that a letter before action from a solicitor, which is adversarial rather than conciliatory and which is intended to claim financial compensation rather than invoke a grievance, nevertheless amounts to a grievance letter. The case further confirmed that it does not matter that the solicitors' letter was headed 'without prejudice' and therefore would not normally be admissible as evidence of its contents in tribunal/court.

(e) Other forms of Communication

Two additional forms of employee communication have been considered, one was an Equal Pay Questionnaire³ and the other a flexible working request⁴. In the former case the EAT relied upon the specific exception set out in the Regulations⁵ which provides that questionnaires submitted to employers under the discrimination legislation do not constitute statutory grievances. In the latter case however, the employee's letter making a formal flexible working request to work 3 days per week instead of full time was held to constitute a statutory grievance. This was because in her letter she complained about her line manager's refusal to consider her previous informal request to reduce her days. Whilst the refusal of the employee's informal request could not have given rise to a claim under the flexible working regulations, it could have formed the basis of a sex discrimination claim.

³ *Holc-Gale v Makers UK Limited*

⁴ *Rutty v Commotion Limited*

⁵ Regulation 14(2)

(f) Grievances about the Handling of Grievances

In *Petherbridge v Mudchute Association*, the EAT held that the statutory grievance procedure could apply to complaints by employees about the way in which their original grievances have been handled by their employers.

Mr Petherbridge was a farm manager for the Mudchute Association and raised a grievance about his line manager's conduct towards him. His grievance was considered by Mudchute's personnel sub-committee but rejected. Mr Petherbridge appealed to Mudchute's board of trustees, but this was also rejected. Mr Petherbridge resigned and wrote to one of Mudchute's trustees stating that the appeal had been "the final straw". He complained about two individuals at Mudchute, one of whom had considered his original grievance with the other having considered his appeal.

When Mr Petherbridge presented a claim for constructive unfair dismissal to the tribunal the preliminary issue arose as to whether or not Mr Petherbridge's letter qualified as a statutory grievance. Mudchute argued that the letter was not a grievance, but was instead a private communication from Mr Petherbridge to one of Mudchute's trustees explaining his reasons for resigning. The tribunal and the EAT rejected that argument. The EAT further held that the letter constituted a fresh grievance, triggering the statutory grievance procedure.

(g) Grievances about Disciplinary Action

Where action taken by an employer against an employee consists of dismissal or "relevant" disciplinary action", the application of the statutory GP is excluded because in such a case the onus is on the employer to initiate the DDP.⁶ However, because disciplinary warnings are excluded from the definition of "relevant disciplinary action" the obligation to follow the statutory standard GP can arise where an employee submits a grievance about a disciplinary warning that he/she has been given. This could force the employer to have to hold a grievance meeting and grievance appeal meeting with the employee, even where the employer has already gone through a disciplinary procedure with the employee which has included an appeal process.

This was exactly what happened in the case of *Galaxy Showers v Wilson*. Mr Wilson resigned in response to having been given a verbal warning in breach of his employer's disciplinary procedures. He stated this in his letter of resignation. The employer responded to Mr Wilson's letter in writing suggesting that if he was

⁶ NB There is one exception to this contained in Regulation 7, where the employee alleges that the employer took relevant disciplinary action against him or her which either (a) amounted to unlawful discrimination or (b) was taken on grounds which were different to those that the employer asserted were the grounds for taking the action. In these situations, the GP applies, but the parties are treated as having complied with it automatically provided that the employee sets this fact out in a statement and submits it to the employer prior to appealing or commencing proceedings.

unhappy about the verbal warning he should reconsider his resignation and submit an appeal, but that it would not deal with his complaint as a grievance. Mr Wilson issued proceedings for constructive unfair dismissal.

The employer argued that the letter of resignation should not be treated as a grievance because the employer's argument went, the fact that Mr Wilson had not submitted an appeal indicated that he had no intention of seeking to internally resolve the complaints made in that letter. This argument was rejected by the EAT who held that a statutory grievance does not need to indicate any intention to pursue a grievance procedure with the employer.

2.3 Grievances after employment has ended

The statutory standard grievance procedure applies even after an employee's employment has ended. As it will be necessary for an employee who wishes to pursue a constructive dismissal claim to demonstrate that he or she has raised a grievance under the statutory grievance procedure, employers may find this type of grievance becomes increasingly common.

The application of the statutory grievance procedure is modified after employment has ended. Essentially, the employer is still obliged to follow the standard grievance procedure, even after an employee's employment has ended, unless it is not reasonably practicable to do so. However, although the employer is able to follow the standard procedure, the employer and employee can agree in writing to follow a modified procedure. The modified procedure simply requires the employer to review the grievance and respond in writing – there is no need for a meeting at either the step 2 or appeal stage.

If it is not reasonably practicable for the employer to follow the standard grievance procedure, the grievance will fall, subject to one exception. The exception arises where the employee has attended a step 2 meeting prior to it becoming not reasonably practicable for the employer to complete the procedure. In this instance, the employer is nevertheless obliged to write to the employee to confirm the outcome of this meeting.

2.4 Exceptions to the application of the statutory grievance procedure

There are some limited exceptions to the general rules which govern the application of the statutory grievance procedure. These are achieved in two different ways. In some circumstances, the Regulations state that the statutory grievance procedure does not apply. In others however, the Regulations state that the parties are to be deemed to have complied with some or all of the steps of the statutory procedure. This is to ensure that the parties escape the detrimental effects of failing to comply with all the steps of the statutory grievance procedure (explained above in section 2.5).

(a) General exceptions

There are three general exceptions as follows:

- Where it is not practicable for either employer or employee to commence the procedure or comply with a requirement of it within a reasonable period

It is difficult to envisage when an employer can rely on this exception. One possible example of the type of scenario where this exception might be relied upon, however, is where an employee is absent from work on long term sick leave and unable to attend a meeting.

- Where the employer or employee has reasonable grounds for believing that complying with the requirements of the statutory grievance procedure would result in a significant threat to any person or any property

Again, it is difficult to envisage when an employer can rely on this narrow exception. One example would be where the employer believes that if it invited an employee to attend a meeting, the employee would be violent. Such a belief would have to be based on earlier evidence of such behaviour having been exhibited however, in order to be reasonable.

- Where the employer or employee has been subject to harassment and has reasonable grounds to believe that following the procedure would result in further harassment

It is practically impossible to envisage an employer being able to rely on this exception.

(b) Specific exceptions

There are four specific exceptions:

- Collective grievances – where a grievance is raised by a trade union representative on behalf of at least two employees. In this circumstance, the employer is under no obligation to follow the statutory grievance procedure.
- After the employee's employment has ended – this is when the modified procedures can be used instead of the standard procedure and is explained in more detail above in section 2.3.
- Whistleblowing – as explained below in section 2.5(a).
- Where the employer has an industry level collectively agreed grievance procedure in place, both parties will be deemed as having complied with the statutory grievance procedure provided the collectively agreed procedure is followed.

In this instance an industry level collectively agreed procedure means a procedure which:

“operates by virtue of a collective agreement made by two or more employers or an employer’s association and one or more independent trade unions.”

2.5 Significance of the statutory grievance procedure

A failure to follow the statutory grievance procedure when it applies, does not give rise to a separate cause of action of itself. Instead, the impact of not following it is on other employment tribunal claims brought by an employee.

There are three key ways in which the introduction of the statutory grievance procedure, when it applies, can impact upon a subsequent claim:

- the claim can be barred by the tribunal;
- the time which the employee has to submit the claim is extended; and
- the level of compensation which can be awarded can be increased or decreased.

(a) Barring claims

If the statutory grievance procedure applies, section 32 (1) of the Employment Act 2002 provides that unless an employee has first raised a grievance, the tribunal will be barred from considering an employment tribunal claim. This provision applies to a range of different types of employment related claims.

Even if an employee/former employee complies with this step, the claim will be temporarily barred until 28 days have expired, thus giving the employer an opportunity to respond and to try to resolve the grievance internally.

Section 32(4) of the Employment Act 2002 provides that the grievance must be submitted to the employer no later than one month after the **original time limit** for submitting the claim. The phrase original time limit is not defined in the Act and has been considered by the Employment Appeal Tribunal in the case of *Cann v BUPA Care Homes (BNH) Limited*.

The EAT held that the phrase **original time limit**, means the time limit set out in the relevant legislation plus any extensions. Thus the employee’s complaint of disability discrimination could still be presented to a tribunal even though the grievance letter was presented more than four months after the alleged discriminatory act, because it was just and equitable under the Disability Discrimination Act 1995 to extend the three month time limit for bringing a claim.

Although not dealt with in the judgment, this interpretation is likely to apply to constructive unfair dismissal cases where a grievance is not sent within four months, but the Claimant establishes it was not reasonably practicable to present a Claim within the ordinary three-month time limit.

A claim will be struck out by a tribunal if no grievance has been submitted. This was the outcome on the case of *Edebi v Canary Wharf Management*. On the facts in this case, the EAT struck the case out because the employee had failed first to submit a grievance even though the employee had written a fairly lengthy letter to the employer containing a variety of complaints about the employee's health. The EAT held that the letter did not raise an issue which the employer could reasonably understand as arising under the Disability Discrimination Act 1995 and therefore Mr Edebi's claim for disability discrimination claim was not allowed to proceed. This case demonstrates that a grievance needs to clearly refer to the claim in respect of which the employee subsequently issues proceedings.

Employers should note however, that section 32 of the Employment Act 2002 does not apply to whistleblowers, who are not constrained to using the statutory grievance procedure when making protected disclosures. The Employment Act 2002 was amended in the House of Lords in recognition of the need to preserve, for genuine whistleblowers, the freedom to do so and to continue to be able to bring employment tribunal claims. A whistleblowing employee has the right to choose whether to raise a concern as a grievance or in some other way.

(b) Extending Time

The Regulations make changes to the application of time limits for bringing employment tribunal claims. The intention behind this is to facilitate the use of the statutory procedures and ensure that there is time to complete them before proceedings must be issued. The Regulations extend the **normal time limit** for bringing a claim by up to 3 months where the relevant procedures have not been completed within the existing time limit. This applies to most types of claim and not just claims for unfair dismissal.

The phrase **normal time limit** is defined in the Regulations and means the three-month period for unfair dismissal and discrimination claims without any extension on the not reasonably practicable / just and equitable basis.⁷

Under the Regulations therefore:-

- where an employee has submitted his/her claim to the employment tribunal within 3 months, but the claim is barred because the employee has not previously submitted an internal grievance – the employee will be given a further 3 months (running from the last day of the normal time limit) to re-submit his/her claim;⁸
- where an employee fails submits his/her claim to the employment tribunal within the normal time limit, but has submitted an internal grievance within this period, the employee will have a further 3 months (running from the last day of the normal time limit) to submit his/her claim.⁹

(c) Compensation

A failure to follow the statutory grievance procedure, when it applies, affects the amount of compensation which an employee can be awarded when bringing an employment tribunal claim. This provision applies in a variety of types of cases, including discrimination cases.

If the failure to comply with the statutory grievance procedure is the fault of the employer, the tribunal can increase the compensation awarded to the employee by as much as between 10% and 50%. Conversely, if an employee is found to have failed to fulfil some or all of his or her obligations under the statutory grievance procedure, his or her compensation can be reduced by between 10% and 50%.

⁷ Note however that the normal time limit for claims for statutory redundancy payments is 6 months

⁸ Regulations 15(1)(b) and 15(3)(a)

⁹ Regulations 15(1)(b) and 15(3)(b)

This briefing note is intended solely as an overview of the law. It was last updated on 16 March 2006. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

For further information please contact Stephen Jenkins, Rhian Brace, Lowri Phillips, Emma Burns, Cerys Davies or Helen Irons at our Cardiff office on (029) 2023 8239.

Appendix

The standard grievance procedure

Step 1: Statement of grievance

The employee must set out the grievance in writing and send the statement or a copy of it to the employer.

Step 2: Meeting

1. The employer must invite the employee to at least one meeting to discuss the grievance.
2. The meeting must not take place unless:-
 - (a) the employee has informed the employer what the basis for the grievance was when he made the statement under step 1, and
 - (b) the employer has had a reasonable opportunity to consider his response to that information.
3. The employee must take all reasonable steps to attend the meeting.
4. After the meeting, the employer must inform the employee of his decision as to his response to the grievance and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: Appeal

1. If the employee does wish to appeal, he must inform the employer. If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.
2. The employee must take all reasonable steps to attend the meeting.
3. After the appeal meeting, the employer must inform the employee of his final decision.

The modified grievance procedure

Step 1: Statement of grievance

The employee must set out in writing: (i) the grievance, and (ii) the basis for it, and send the statement or a copy of it to the employer.

Step 2: Response

The employer must set out his response in writing and send the statement or a copy of it to the employee.

The general requirements

Timetable

Each step and action under the procedure must be taken without unreasonable delay.

Meetings

1. Timing and location of meetings must be reasonable.
2. Meetings must be conducted in a manner that enables both employer and employee to explain their cases.
3. In the case of appeal meetings, which are not the first meeting, the employer should, as far as is reasonably practicable, be represented by a more senior manager than attended the first meeting (unless the most senior manager attended that meeting).