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Employment Dispute Resolution

An overview of the statutory minimum procedures applying to employers dealing with dismissals, disciplinary action and employee grievances

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Seminar Presentation Handout
Tuesday 1 May 2007

Let's Talk

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1. Introduction

On 1 October 2004, two new compulsory statutory procedures came into force; one which employers must follow when dismissing or disciplining employees; and the other which employers must follow when dealing with employee grievances. The introduction of these new statutory minimum procedures constitutes a significant change in employment law.

The Government's intention behind the introduction of the procedures was to encourage the resolution of disputes between employers and employees internally and without recourse to employment tribunal litigation.

To coincide with the introduction of the new statutory minimum procedures, ACAS took the opportunity to revise its Code of Practice on Disciplinary and Grievance Procedures. Both the DTI and ACAS have also produced additional guidance on how to comply with the procedures.

The statutory procedures are contained in the Employment Act 2002. There are two basic statutory procedures, a Dismissal and Disciplinary Procedure (DDP) and a Grievance Procedure (GP). Each has a standard procedure and a modified procedure. In most cases, employers are required to follow the standard procedures. The modified procedures however may be followed in certain specific circumstances. In the case of the modified DDP, this is explained further at section 3.2 (b) of this briefing note. In the case of the modified GP, this is explained further at section 6.2 of this briefing note. There are also general requirements which apply to both procedures. The procedures are set out in full in this document.

The detail of when the new statutory procedures must be followed is contained in the Employment Act 2002 (Dispute Resolution) Regulations 2004 (the "Regulations"). It is important for employers and employees to fully understand when the statutory procedures must be followed, as a failure to comply with an applicable procedure will have an impact on any subsequent tribunal litigation. This is explained further below in sections 4 and 7.

This briefing note is intended to provide an overview of the new law and its impact on employers. To accompany this general briefing note, Geldards LLP has also prepared two detailed guidance notes which focus on (a) dealing with disciplinary issues and (b) dealing with grievances. These contain advice and practical guidance for employers regarding the steps they need to take to comply with the statutory procedures and the revised ACAS Code in specific situations.

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2. When Must the DDP be Followed?

As its name suggests, the DDP applies in situations when an employer is dismissing an employee (see section 3.1) or taking disciplinary action against an employee (see section 3.2). The DDP is not compulsory in all situations however and there are a number of specific and general exceptions to the basic rules.

2.1 Dismissals

(a) Standard Procedure

According to the Regulations, the standard DDP must be followed whenever an employer contemplates or actually dismisses an employee. Dismissals for all types of reasons are covered including dismissals for conduct, capability (including ill health and poor performance dismissals), redundancy and even "some other substantial reason" dismissals. For these purposes, a dismissal includes a failure to renew a fixed term contract, but does not include a constructive dismissal.[1]

Although most employers will be familiar with the concept of following a procedure for dismissals arising in a disciplinary context, following a procedure for all types of dismissals is new and constitutes a significant change in practice.

New dismissal scenarios where the DDP must be followed include:

- the termination of an employee during his or her probationary period;
- the failure to renew a short fixed-term contract of a casual employee;
- a dismissal in a redundancy situation (except where 20 or more employees are being made redundant);
- compulsory retirement situations.

In all of these situations, an employer must follow each of the three steps within the standard DDP, (including offering the employee a right of appeal) or risk a finding that the dismissal is unfair.

[1] Regulation 2 confirms that dismissal has the meaning given to it in s.95 (1) (a) and (b) of the Employment Rights Act 1996, but not s.95 (1) (c)

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(b) Modified Procedure

Employers can choose to follow the two step modified instead of the standard DPP in certain cases of gross misconduct. As explained below however, the number of dismissals likely to fall within this exception are very small.

The Regulations[2] state that the modified DPP can be followed instead of the standard DDP where:

- the employer dismissed the employee by reason of his conduct without notice;
- the dismissal occurred at the time the employer became aware of the conduct or immediately thereafter;
- the employer was entitled, in the circumstances, to dismiss the employee by reason of his/her conduct without notice or any payment in lieu of notice, and
- it was reasonable for the employer, in all the circumstances, to dismiss the employee before enquiring into the circumstances in which the conduct took place.

There remains a great deal of uncertainty with regard to the extent to which an employer could ever be entirely comfortable that it would not subsequently be criticised for relying on the modified DDP rather than the standard DDP. It is difficult to conceive of any conduct by an employee where it would be reasonable, in all the circumstances, to conclude that any investigation into the matter would be futile. Most advisers agree that it will only be in the very rarest of circumstances that an employee's guilt will be so blatant. It is far better practice to suspend an employee pending a full investigation, rather than jump straight to dismissal using the modified DDP.

(c) Exceptions in the Case of Dismissals

There are some exceptions to the principle that the DDP must be followed in the case of ALL dismissals. The Regulations[3] state that the DDP does not need to be followed in the case of:

- dismissals in circumstances where the employment cannot legally continue such as for example situations where an employer becomes aware that an employee is working illegally without a work permit or in contravention of a statutory provision;
- certain dismissals connected with industrial action; and

[2] Regulation 3 (2)

[3] Regulation 4

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- dismissals where the employer's business suddenly collapse; and
- collective dismissals including (i) dismissals where there is an obligation to undertake collective redundancy consultations and (ii) the situation where an employer terminates the employment of a class of employees in order to effect a change to the employee's terms and conditions of employment.

There are also a couple of very specific and narrow exceptions. One of these is an exception in the Regulations[4] to the application of the modified DPP. It arises when an employer dismisses an employee summarily and the employee submits a claim to an employment tribunal before the employer has even complied with step 1 of the modified DPP. In such a case, neither version of the statutory DPP applies.

The second very specific exception in the Regulations[5] operates such that the parties are treated as if they have complied with the appeal stage of the standard DPP even though in reality they have not. This applies where an applicant issues a claim for interim relief following a dismissal.

2.2 Disciplinary Action

The standard DDP must be followed whenever an employer is considering taking "relevant" disciplinary action against an employee. "Relevant" disciplinary action is defined in the Regulations[6] as being:

> "*any action short of dismissal, which the employer asserts to be based wholly or mainly on an employee's conduct or capability, but specifically excluding:*
>
> *(i) suspension on full pay; and*
>
> *(ii) the issuing of warnings (whether written or oral).*"

The decision not to have the DPP apply to disciplinary warnings is extremely controversial and likely to cause employers some difficulty in practice. For example, in the case of a disciplinary matter where dismissal is a possible outcome, the employer would be well advised to follow the standard DDP "just in case" dismissal is the penalty chosen, albeit that at the outset, dismissal is not the most likely outcome.

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[4] Regulation 3(2)

[5] Regulation 5(1)

[6] Regulation 2

To further complicate matters for employers, the revised ACAS code continues to recommend that employers always conduct a disciplinary meeting before issuing a disciplinary warning and offer a right of appeal against disciplinary warnings. In addition, it is possible for an employee to raise a grievance following a disciplinary warning which would trigger the employer's obligation to follow the statutory grievance procedure. (See [ ] below).

2.3 General Exceptions

There are *four* general exceptions to the basic rule that the DDP must be followed for all dismissals and whenever relevant disciplinary action is contemplated.

- The first of these applies where there is an industry level collective agreement in place providing it incorporates an effective appeal process. In such cases, compliance with the collective procedure will ensure deemed compliance with the statutory procedure.[7]

  In the Regulations, 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*."[8]

- The second general exception arises where it is not practicable for a party (either employer or employee) to commence the DDP or comply with a requirement of it within a reasonable period.[9]

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

- The third general exception arises where one party (employer or employee) has reasonable grounds for believing that complying with the requirements of the DDP would result in a significant threat to any person or any property.[10]

  It is difficult to envisage when an employer would be able to rely on this narrow exception. One example would be where an employer thinks that if it invited an employee to attend a meeting, the employee

[7] Regulations 5(2) and 10

[8] Regulations 5(3)(b) and 10 (a)

[9] Regulation 11(3) (c)

[10] Regulation 11 (3) (a)

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.

- The fourth and final general exception is where one party (employer or employee) has been subjected to harassment and has reasonable grounds to believe that following the DDP would result in further harassment.[11]

  It is practically impossible to envisage an employer being able to rely on this exception. In the Regulations, harassment is defined as:

  > *"conduct which has the purpose or effect of:-*
  >
  > *violating a person's dignity; or*
  >
  > *creating an intimidating, hostile, degrading, humiliating or offensive environment for that person,*
  >
  > *but such conduct shall only be regarded as having that purpose or effect if, having regard to all the circumstances, including in particular the perception of the person who was the subject of the conduct, it should reasonably be considered as having that purpose or effect."*

In a case where the harassment exception is relied upon, the party responsible for the harassment is deemed to have failed to comply with the DDP.[12]

3. Why is it Important to Follow the DDP?

The DDP is important because it links to a number of aspects relating to the submission and consideration of tribunal claims by employees. There are three important impacts on tribunal claims which employers need to be aware of:

- the time limit for submitting the claim;
- in the case of an unfair dismissal claim, the actual legal test to be applied; and

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[11] Regulation 11 (3) (b)

[12] Regulations 12 (3) and (4)

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- the level of compensation which can be awarded.

3.1 Time Limit for Submitting a Claim

Prior to 1 October 2004, an employee generally had 3 months to submit a claim of unfair dismissal or discrimination to an employment tribunal. In unfair dismissal cases the tribunal had very little discretion to allow claims submitted late to proceed. In discrimination cases there was a wider discretion to extend time, but the employee would have to have a good argument to persuade the tribunal to exercise this discretion.

Since 1 October 2004, the time for submitting claims has been extended. The idea behind this is to allow more time for a dispute to be resolved internally between the employer and employee (or former employee as the case may be) before an external adjudicator is called upon to consider the matter.

Now, if an employee submits a claim to an employment tribunal outside the normal time limit, the tribunal will allow the claim to proceed providing:-

- the employee can persuade the tribunal that he/she had reasonable grounds for believing that an internal dismissal or disciplinary procedure (this can but need not be the statutory DDP) was still in the process of being followed at the date the claim should have been submitted;

and

- the claim is submitted no later than 3 months after the normal time limit.[13]

In effect, this means that the time for submitting a claim is extended to 6 months where the appeal process has not been completed. The normal discretion to extend time beyond the new time limit remains in place.

The ability to extend time was considered in the Employment Appeal Tribunal case of *Piscitelli v Zilli Fish Limited.*

Mr Piscitelli was employed by the restaurant Zilli Fish as a general manager. In January 2005 he was suspended following an allegation that he had included a service charge on customers' bills and stolen equivalent cash amounts from his employer's till. Mr Piscitelli attended a disciplinary hearing on 2 February at which he was summarily dismissed for gross misconduct.

[13] Regulation 15(2)

On 23 February, solicitors instructed on behalf of Mr Piscitelli wrote to Zilli Fish to complain that the dismissal had been unfair and to make an offer to settle in advance of employment tribunal proceedings. Attempts were made to negotiate a settlement but they failed on 9 May, when Zilli Fish stated that it was not prepared to discuss the matter further.

On 11 May Mr Piscitelli's solicitor lodged claims for unfair dismissal, breach of contract and unpaid wages with the employment tribunal. The three month primary limitation period for the claim had expired on 1 May.

A tribunal chairman dismissed the claims as out of time. He concluded that the letter of 23 February did not amount to an appeal against the dismissal decision of 2 February, as Mr Piscitelli asserted and therefore the Regulations did not therefore operate to extend the original time limit as Mr Piscitelli did not have reasonable grounds to believe an appeal procedure was still ongoing. This decision was upheld at the appeal.

3.2 The Law Relating to Unfair Dismissal

The introduction of the DDP has coincided with a change to the legal test applied in cases of unfair dismissal. The test has been changed in two very significant ways: (a) the introduction of a new situation of automatically unfair dismissal; and (b) the reversal of part of the decision in an important employment law case known as the *Polkey* case. The differences between how the law of unfair dismissal operated until 1 October 2004 and how it operates now are explained below and set out in the flow charts in this briefing note.

(a) Automatic Unfairness

Previously, a dismissal was only considered to be automatically unfair, if an employee could establish that the reason for the dismissal was one of a small number of “automatic” reasons (such as a dismissal for a reason relating to pregnancy or because an employee has made a public interest disclosure). In all other cases, employment tribunals were required to give careful consideration as to whether a dismissal was fair or not, taking into account the reason for the dismissal and all the circumstances.

To be fair, a dismissal had to be for one of the fair reasons set out in the Employment Rights Act 1996. Providing this question was satisfied, the employment tribunal then went on to ask itself if the dismissal was legally fair taking into account whether, given the particular circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee. The factors that were considered included the procedure followed by the employer and whether the ACAS code was followed.

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Since 1 October 2004 and the coming into force of the DDP, an employee is now additionally to be regarded as having been automatically unfairly dismissed if the statutory DDP applied to the dismissal and his/her employer failed to follow it. The converse position however (i.e. if an employer follows the DDP, the dismissal will be automatically fair) is not true. Following the DDP does *not* guarantee fairness or reasonableness. The employer is still expected to behave fairly and reasonably in all the circumstances of the case and this will be tested in this regard against previous case law and the revised ACAS code.

(b) The Rule in Polkey

Previously, an employer's failure to follow a reasonable and fair procedure led to the dismissal being unfair, even if the only mistake made by the employer was a procedural mistake that ultimately made no difference to the end result. This principle was established in a famous case called *Polkey v A E Drayton Services Limited*.[14]

The principle in the Polkey case has no longer applied since 1 October 2004. Now where an employer has followed the DDP, but has mistakenly not followed another procedural requirement that is demanded by the need to be generally fair and reasonable, providing the employer can demonstrate that it would have decided to dismiss the employee in any event, the further procedural failing will not result in a finding of unfair dismissal.

3.3 Compensation

A failure to follow the DDP (when it must be followed) will also affect the amount of compensation which an employee can be awarded when bringing an employment tribunal claim in 2 ways:

- Where a dismissal is found to be unfair because of an employer's failure to follow the statutory DDP, the employee will receive a minimum award of at least 4 weeks pay, regardless of his or her actual entitlement.

- In addition an employer's failure to follow the DDP will lead to a successful employee's compensation being increased by as much as between 10% and 50%. The ability of employment tribunals to increase compensation in this way is not just limited to unfair dismissal cases, but also applies in a variety of other types of cases, including discrimination cases. Conversely, if an employee has failed to co-operate with the requirements of DDP, by for example, not submitting an appeal, his or her compensation can be reduced by between 10% and 50%.

[14] Polkey v AE Drayton Services Ltd [1987] IRLR 503,HL

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The calculation of compensation following a failure to follow the statutory DDP has been considered in the case of *Thomas v Scorah t/a Premier Plus*. Miss Thomas was employed from 1999 as a sales assistant in a general store owned by Mrs Scorah. Two incidents occurred during Miss Thomas' shift one evening in November 2004. In the first incident it was alleged that Miss Thomas had taken some rent money owed to Mrs Scorah which had been given to another of the assistants for safekeeping. In the second incident Miss Thomas was observed on CCTV rummaging through the handbag of one of her colleagues whose purse was subsequently found to have gone missing.

The police were called and statements were taken. Miss Thomas was called into a meeting on 21 November 2004 and summarily dismissed on grounds of theft. Mrs Scorah however had not carried out any investigation to support her belief that Miss Thomas was guilty of theft. In response to her dismissal, Miss Thomas wrote to Mrs Scorah and appealed against her dismissal, but received no response. Miss Thomas was subsequently charged with theft by the police but the charges were discontinued in January 2005.

Miss Thomas complained to an employment tribunal that she had been unfairly dismissed. The tribunal got very confused about the test they were meant to be applying and the claim ended up at the Employment Appeal Tribunal.

The EAT found that Mrs Scorah was not in fact disputing liability for unfair dismissal on the grounds of admission that the statutory DDPs had not been followed. Instead her argument was that in assessing compensation, the tribunal should have taken into account the fact that, had a fair procedure been followed, the employee would have been dismissed anyway and her compensation should reflect this as in the original *Polkey* case. The EAT agreed that the possibility of making *Polkey* deductions remains and given that a *Polkey* deduction can be up to 100% of compensation, this is very significant.

The case has been remitted to a fresh tribunal hearing for consideration of this matter. It should be noted however that if the new tribunal decides to reduce the compensatory award to reflect the *Polkey* argument, the employer in this case will still face an uplift in the award of between 10% and 50% to reflect its failure to follow the appropriate statutory DDP. However an uplift on nil compensation is nil.

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4. The Grievance Procedure

4.1 When Must the Grievance Procedure be Followed?

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")[15].

(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".

(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 clearly applies; or
- it is very clear that the grievance is trivial or fallacious.

[15] SI 2004/752

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(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 discus 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 Questionnaire[16] and the other a flexible working request[17]. In the former case the EAT relied upon the specific exception set out in the

[16] Holc-Gale v Makers UK Limited

Regulations[18] 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.

(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.[19] However, because disciplinary warnings are excluded from the definition of "relevant disciplinary action" the

[17] Rutty v Commotion Limited

[18] Regulation 14(2)

[19] 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.

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 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.

(h) Modified GP

The obligation to follow the standard GP does not cease when an employee's employment comes to an end. However, in most cases, after an employee's employment has come to an end, the employer can opt to use the modified GP instead of the standard GP, providing certain conditions are met. [20]

Whether or not the modified GP can be used depends on whether it would be reasonably practicable to follow the standard GP and whether the parties agree to use the modified GP instead of the standard GP. For example:-

- if the employee has not submitted a grievance at the time his or her employment comes to an end, but nevertheless it remains reasonably practicable for the parties to follow the standard GP, the parties can agree in writing to follow the modified GP instead of the standard GP;

- if the employee had submitted his or her grievance prior to his or her employment coming to an end, but the standard grievance procedure had not been completed by this time, but nevertheless it remains reasonably practicable for the parties to follow the standard GP, the parties can again agree in writing to follow the modified GP instead of the standard GP.

[20] Regulation 6 (3)

If however, whether or not an employee had submitted a grievance prior to leaving, it has become not reasonably practicable to commence or to continue with the standard GP, the employer and employee are not bound to follow either of the statutory grievance procedures and the grievance falls away.[21] The only exception to this arises when there has already been a meeting under step 2 of the GP, in which case the employer is still obliged to write to the ex-employee with the outcome of that meeting.

The Regulations do not specify in what circumstances it will remain reasonably practicable for the standard grievance procedure to be followed after an employee has left, or more importantly when the obligation to deal with an employees grievance falls. The DTI Guidance does not offer any assistance on this point. It is anticipated however that the grievance may fail if the employee is ill and unable to attend a grievance meeting or if he/she has moved away and attending a meeting would be impracticable.

4.2 Specific Exceptions to the Application of the GP

In contrast to the number of dismissals where there is an exception to having to follow the DDP, there is only one specific grievance scenario where the statutory GP does not need to be followed. This arises where the same grievance is brought by a trade union representative or other elected employee representative on behalf of at least 2 employees.[22]

4.3 General Exceptions to the Application of the GP

The same general exceptions as apply to the DDP apply to the GP.

- The first of these applies where there is an industry level collective agreement in place which applies an agreed grievance. In such cases, compliance with the collective procedure will ensure deemed compliance with the statutory procedure.[23]

  In the Regulations 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."[24]

[21] Regulation 6 (4)

[22] Regulation 9

[23] Regulations 5(2) and 10

[24] Regulations 5(3)(b) and 10 (a)

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- The second general exception arises where it is not practicable for a party (either employer or employee) to commence the procedure or comply with a requirement of it within a reasonable period.[25]

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

- The third general exemption arises where one party (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.[26]

  It is difficult to envisage when an employer would be able to rely on this narrow exception. One example would be where an employer thinks 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.

- The fourth and final general exemption arises where one party (employer or employee) has been subjected to harassment and has reasonable grounds to believe that following the procedure would result in further harassment.[27]

  It is practically impossible to envisage an employer being able to rely on this exception. In the Regulations, harassment is defined as:-

  "*conduct which has the purpose or effect of:-*

  violating a person's dignity; or

  creating an intimidating, hostile, degrading, humiliating or offensive environment for that person,

  but such conduct shall only be regarded as having that purpose or effect if, having regard to all the circumstances, including in particular the perception of the person who was the subject of the conduct, it should reasonably be considered as having that purpose or effect."

  In a case where the harassment exception is relied upon, the party responsible for the harassment is deemed to have failed to comply with the relevant procedure.[28]

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[25] Regulation 11(3) (c)

[26] Regulation 11 (3) (a)

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5. Why is it Important to Follow the GP?

If an employer or employee fails to comply with any aspect of the statutory GP, this may have an impact on any subsequent employment tribunal litigation as follows:

- whether the claim could be barred by the tribunal;
- the time limit for submitting the claim; and
- the level of compensation which can be awarded.

5.1 Barring Claims

One significant consequence for employees of the new regime, is that any employee who fails to first raise an internal grievance will be barred from issuing employment tribunal proceedings against his or her employer, if the circumstances were such that the statutory GP should have been followed.[29]

Under the statutory GP, an employee or former employee is required to set out his or her grievance in writing and send it to his or her employer. Unless the employee/former employee does this, his or her claim will be barred. Even if an employee/former employee does comply with this step in order to submit a tribunal claim, 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.

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[27] Regulation 11 (3) (b)

[28] Regulations 12 (3) and (4)

[29] s.32(2) Employment Act 2002

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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.

Whistleblowers are not constrained to using the statutory GP when making protected disclosures however, as 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. An employee in these circumstances has the right to choose whether to raise a concern as a grievance or in some other way.

5.2 Time Limits

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 time limit for bringing a claim (which in most cases is 3 months from the date of the act complained of or the date of dismissal) by up to 3 months where the relevant procedures have not been completed within the existing time limit. This applies to all types of claim and not just claims for unfair dismissal.

Under the Regulations:-

- where an employee has submitted his/her claim to the employment tribunal within the normal time limit, but the claim is barred because the employee has not submitted an internal grievance first – the employee will be given a further 3 months (running from the last day of the normal time limit) to re-

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submit his/her claim providing that the employee submits the internal grievance no later than 1 calendar month after the expiry of the normal time limit;[30]

- where an employee has submitted his/her claim to the employment tribunal service within the normal time limit, but has not waited 28 days after submitting an internal grievance before doing so, the claim will be rejected. The employee will have until 3 months after the expiry of the original time limit to re-submit his/her claim; and[31]

- where an employee has not submitted a 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.[32]

5.3 Compensation

A failure to follow the GP affects the amount of compensation which an employee can be awarded in a similar way as a failure to comply with the DDP does, in that it can lead to an employee's compensation being increased by as much as between 10% and 50%. The ability of employment tribunals to increase compensation in this way is not limited to constructive unfair dismissal cases, but also applies in a variety of other types of cases, including discrimination cases. Conversely, if an employee has failed to co-operate with the requirements of the GP, his or her compensation can be reduced by between 10% and 50%.

This briefing note is intended solely as an overview of the law. It was last updated on 5 April 2007. 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, Kim Howell, Lowri Phillips, Emma Burns, Cher Jones or Helen Irons at our Cardiff office on (029) 2023 8239.

[30] s.32(4) Employment Act 2002 and Regulations 15(1)(b) and 15(3)(a)

[31] Regulation 15(3)(a)

[32] Regulations 15(1)(b) and 15(3)(b)

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Appendix 1 - The Statutory DDP

The standard dismissal and disciplinary procedure

Step 1: Statement of grounds for action and invitation to meeting

1. The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

2. The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: Meeting

1. The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.
2. The meeting must not take place unless:-
   (a) the employer has informed the employee what the basis was for including in the statement under step 1 the ground or grounds given in it, and
   (b) the employee 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 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.
2. If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.
3. The employee must take all reasonable steps to attend the meeting.
4. The appeal meeting need not take place before the dismissal or disciplinary action takes effect.
5. After the appeal meeting, the employer must inform the employee of his final decision.

The modified dismissal and disciplinary procedure

Step 1: Statement of grounds for action

The employer must:

1. Set out in writing:-
   (i) the employee's alleged misconduct that has led to the dismissal

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(ii) what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and

(iii) the employee's right to appeal against dismissal,

2. Send the statement or a copy of it to the employee.

Step 2: Appeal

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

Appendix 2 –The Statutory Grievance Procedure

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. 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.

Appendix 3 - 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).

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