

THOMAS · MORE · CHAMBERS

**STATUTORY DISMISSAL
AND GRIEVANCE
PROCEDURES:
DEVELOPMENTS**

**Monday 14th May
6pm to 7pm**

**EMPLOYMENT LAW
GROUP**



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Key legislation includes:

- Employment Act 2002 (“EA”)
- Employment Act 2002 (Dispute Regulations) 2004 (SI 2004/752) [“2004 Regulations”]
- Employment Rights Act 1996 (as amended) [“ERA”]

1. These procedures came into effect from 1 October 2004 and are designed to encourage employers and employees to resolve disputes without recourse to litigation. They lay down minimum procedures in relation to grievances, and before taking disciplinary action or dismissing employees.
2. These notes assume a basic knowledge of these procedures, and are not intended to rehearse the contents of the legislation. The Regulations have fallen for consideration in a large number of cases.

Dismissal and Disciplinary Procedures

3. The standard procedures require three steps:
 - (a) Step 1: a written statement by the employer setting out the grounds that led him to contemplate dismissing or taking disciplinary action against the employee and an invitation to the employee to attend the meeting.
 - (b) Step 2: a meeting, prior to which the employer must have informed the employee of the ‘basis’ for the grounds of action, and the employee must have had a reasonable opportunity to consider his or her response to that information.
 - (c) Step 3: appeal, the employee must be informed of his right to an appeal, and where the employee indicates he wishes to appeal, the employer must invite the employee to attend a further meeting.
4. The modified procedure applies only to gross misconduct dismissals:
 - (a) Step 1: the employer must set out in writing and send to the employee a “statement of grounds for action” which identifies the employee’s alleged misconduct that has led it to the dismissal, and notify him of his right to appeal.

- (b) Step 2: the employee must inform the employer if he wishes to appeal, following which the employer must invite him to a meeting. The employee must take all reasonable steps to attend the meeting, after which the employer must inform the employee of its decision.
5. Further general requirements apply to the DDPs (Part 3, Schedule 2 EA)
- (a) Each step and action of the procedures must be taken without reasonable delay;
 - (b) The timing and location of meetings must be reasonable, and they must be conducted so as to enable employers and employees to explain their case.
 - (c) At an appeal, the employer should be represented by a more senior manager than at the first meeting;
 - (d) There is a right to be accompanied (paragraph 14 Schedule 2 EA).
 - (e) The meeting can be rearranged to accommodate an employee's chosen companion, but such a request may only be made twice.
6. In summary, if an employer fails to comply with the applicable DDP when dismissing an employee (with more than one year's service) the dismissal will be automatically unfair: s.98A ERA. The issue of compliance is a mixed question of fact and law: **Alexander & Hatherley v Brigden Enterprises Ltd** [2006] IRLR 422.

When does the DDP apply?

7. The DDP applies when the employer is contemplating dismissing or taking relevant disciplinary action (defined as action, short of dismissal, which the employer asserts to be based wholly or mainly on the employee's conduct or capability: Reg 2). This does not include:
- (a) Constructive Dismissal;
 - (b) Discrimination constructive dismissals: **Spillett** and **BUPA**;
 - (c) Suspension on full pay;
 - (d) Issue of warnings, whether oral or written
 - (e) Collective dismissals involving termination and re-engagement;

- (f) Collective redundancies to which s.188 TULR(C)A applies;
 - (g) Where the employer's business suddenly ceases to function because of an event unforeseen by the employer that makes it impractical of him to employ any employees;
 - (h) Where the contract has become unlawful;
 - (i) Where the employee is covered by a designated dismissal procedures agreement under s.110 ERA.
8. The parties are treated as having complied with the requirements for a Step 3 appeal where:
- (a) An employee makes an application for interim relief (Reg 5(1)) – but *only* when Steps 1 and 2 (standard) or Step 1 (modified) have been complied with;
 - (b) The employee complies with a collectively agreed appeal procedure: Reg 5(2) and (3).
9. The DDPs do not apply or are deemed completed where (Reg 11):
- (a) A party has reasonable grounds for believing that commencing or complying with them will result in a “significant threat” to any person or property.
 - (b) A party has been subjected to harassment and has reasonable grounds for believing that commencing or complying with them would result in being subjected to further harassment;
 - (c) It is not “practicable” for the party to commence or comply with the DDPs “with a reasonable period”.
10. If an employer, fails to follow the DDP in relation to a disciplinary case (other than dismissal), there is no specific sanction as such. NB **Masterfoods v Wilson** EAT 202/06. Nor is breach of the procedures itself actionable as automatically unfair dismissal where the employee does not have one year's service: **Scott-Davies v Redgate Medical Services** UKEAT 0273/06.

Step 1

11. The Step 1 statement should “do no more than state the issue in broad terms ... the employee simply needs to be told that he is at risk of dismissal and why”: **Alexander v Brigden** [2006] IRLR 422.
 - (a) In conduct cases, the Step 1 statement will need to “[i]dentify] the nature of the misconduct in issue, such as fighting, insubordination or dishonesty;
 - (b) In other cases, “it may require no more than specifying, for example, that it is a lack of capability or redundancy”.
12. In **Draper v Mears** [2006] IRLR 869, it was sufficient for the statement of, in a case involving dismissal for driving a company vehicle after consuming alcohol, “conduct which fails to reasonably ensure the health and safety of oneself and others”. The EAT held that where there is ambiguity over the content of the Step 1 letter the Tribunal is “entitled to look at the whole context”.
13. If an employer discovers evidence of further and distinct act of misconduct, it will need to send the employee a fresh Step 1 letter. However, in **Silman v ICTS (UK) Ltd** [2006] All ER (d) 04 (Apr), this is not necessary where there is merely a minor reformulation, or some extra evidence.

Step 2

14. It is irrelevant whether the Step 2 meeting deals with any other matter: Reg 2(2), and so long as it has the purpose in part of discussing the concerns set out in the Step 1 statement, it will comply with the statutory requirements. It can include where the employee initiated the meeting: **Patel v Leicester City Council** EAT 0368/06.
15. The EAT in **Alexander** considered the nature of the information the employer must give to the employee in order to inform him of the “basis” for its concerns set out in Step 1:
 - (a) The information does not need to be in writing and can be given orally;

- (b) The information is “an explanation as to why the employer is contemplating dismissing that particular employee”;
- (c) Misconduct cases – involves putting the case against the employee with sufficient detail to enable the employee properly to put forward his side of the story.
- (d) Redundancy:
 - (i) Why the employer considers that there is a redundancy situation;
 - (ii) Why the employee is being selected, and details of the criteria;
 - (iii) The employee’s assessment against those criteria.

16. The case of **YMCA v Stewart** UKEAT/0332/06 held that:

- an initial investigatory meeting can amount to a Step 2 meeting;
- the decision to dismiss can legitimately be communicated *during* the Step 2 meeting;
- where an employer is required to investigate further matters in response to points raised by an employee, there is no obligation to send a revised Step 1 letter or hold a further Step 2 meeting.

Reversal of Polkey and s.98A(2) ERA

17. Section 98A(2) provides:

“Subject to [Section 98A(1) ERA], failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Section 98(4)(a) as by itself making the employee’s action unreasonable if he shows he would have decided to dismiss the employee if he had followed the procedure.”

18. It is clear that it does not apply unless the employer has complied with the basics of the minimum statutory procedure: **Alexander**.

- (a) Where the section bites, the Tribunal needs to consider what level of Polkey reduction is appropriate.
 - (i) Where this is 50% or more, no compensation is payable.

- (ii) If it less than 50%, such a deduction to compensation should be made.
 - (b) Where there is a breach of the DDP, s.98A(2) does not apply, and a Polkey reduction of up to 100% is possible.
- 19. The EAT is yet to address the issue as to whether the reversal operates only where a DDP applies, and has been complied with, or also where no DDP applies.
- 20. The question that has been considered a number of times, but so far only at EAT level, is what is the meaning of a procedure?
 - (a) In **Alexander** the EAT considered that the meaning of procedure should be interpreted widely rather than narrowly, and it should mean any procedure which the Tribunal considers in fairness the employer ought to have complied with.
 - (b) In **Pudney v Network Rail Infrastructures Ltd** EAT/0707/05, the EAT held that a procedure included those incorporated in contracts, set out in policy documents, and those from unwritten custom and practice. It does not include a lapse from standards of reasonableness.
 - (c) In **Mason v Governing Body of Ward End Primary School** [2006] IRLR 432, the EAT held that a procedure is written or unwritten, contractual or non-contractual, contained in an agreement or a policy which relates to dismissal of employees and which has not been followed.
- 21. However, the preferred view as set out in **Kelly-Madden v Manor Surgery** EAT/0105/06 is that the wider view, as set out in **Alexander** should be preferred. This has been described as “established” by the court in **YMCA Training**.
- 22. While on the topic of Polkey, a very helpful analysis has been recently given in **Software 2000 v Andrews** [2006]. A summary of the guidance is attached to this document (paragraph 54 of the judgment).

Time Limits

23. There is only one ground for the extension of time limits under the DDP procedure under Regs 15(1)(a) and (2) the “normal time limit” for presenting a claim from three months less one day to six months, where the employee has reasonable grounds for believing, when the normal time limit expired, that “a dismissal or disciplinary procedure ... was being followed in respect of matters that consisted of or included the substance of the Tribunal complaint”.
24. One debate is whether the regulations have removed the Tribunal’s discretion to extend time to hear an unfair dismissal claim under the reasonable practicability test in s.111(2)(b) ERA, once the Regulation applies. In the case of **Spillett** and **BUPA**, the EAT held that the three month extension only applies to the normal time limit, and not the original time limit.

Grievance Procedures

25. There are two types of grievance procedures set out by the Regulations: the standard and modified grievance procedures. In summary, the standard grievance procedures require the following:
 - (a) The employee must set out the grievance in writing and send it to the employer (Step 1)
 - (b) The employer must invite the employee to a meeting at which the grievance can be discussed. The meeting must not take place unless the employee has informed the employer of the basis for the grievance and the employer has had a reasonable opportunity to consider his response. (Step 2).
 - (c) The employee must be offered an opportunity to appeal. If he wishes to appeal, he must inform the employer, and the employer must then invite him to a further meeting. (Step 3)
26. Certain general requirements apply (paragraphs 11 to 13 of Schedule 2 EA) as set out above in relation to DDPs. In **Abbey National plc v Fairbrother** EAT/084/06, Lady

Smith indicated that the range of reasonable responses test applies to the conduct of GPs.

27. The effect of the grievance procedures is two fold. Firstly a failure to follow a grievance procedure when it is appropriate to do so acts as a bar on bringing a claim in the Employment Tribunal. Secondly a non-completion of the procedures means that the Tribunal must consider whether an uplift of compensation is required.

When do Grievance Procedures Apply?

28. The procedures apply to all the complaints listed in Schedules 3 and 4 EA.
29. However, the Regulations add several layers of complexity. Basically in certain circumstances the grievance procedures will not apply at all.

- (a) Where the grievance relates to an actual or contemplated dismissal.
- (i) The procedures do however apply to a constructive dismissal.
- (ii) Reg 6(6) and 7(1): the GPs will only apply to actual or contemplated disciplinary action if the grievance relates to an allegation that:
- the disciplinary action itself amounts to unlawful discrimination;
 - or
 - the grounds for the disciplinary action have changed since the employer's Step 1 statement.

The procedures will be deemed to have completed the applicable grievance procedure so long as the Step 1 grievance is sent before the Step 3 appeal stage of any DDP, or (where there is no DDP being followed) before presenting a Tribunal complaint.

- (b) Reasonable Practicability exemption:
- (i) Reg 6(4): If the employment has ended and it has "ceased to be reasonably practicable" of the employee to send a Step 1 grievance, the GPs will not apply.
- (ii) Reg 8(1): Where the standard GP has been commenced, the same provisions apply as above.

- (c) Reg 6(7): as with Reg 11(3) DDPs above.
30. As set out above, failure to use the grievance procedures operates to prevent the employee from bringing a claim. Section 32(6) operates as a jurisdictional bar “if, and only if”:
- (a) Under s.32(6)(a) EA, “the breach is apparent to the Tribunal from the information supplied to it by the employee in connection with the bringing of the proceedings”; or
 - (b) Under s.32(6)(b) EA, “the Tribunal is satisfied of the breach as a result of the employer raising the issue of compliance in accordance with regulations under Section 7 of the ETA 1996”.
31. It is arguable as to whether there are in fact regulations under s.32(6): **Holc-Gale v Makers UK Ltd** [2006] IRLR 178; **Commotion Ltd v Ruddy** [2006] IRLR 171. In **Holc-Gale** the EAT held that “subject to any prejudice to the claimant it [is] open to the respondent to apply for leave to amend the response”. Thereafter, “the point having been raised [by the respondent] it [is] open to the claimant to restart proceedings after putting in a written grievance”.
32. Claims against other employees: in the case of **Bissett v Martins** [2006] UKEAT 023/06 the GPs may not apply when an employee brings a discrimination complaint against fellow employees. However, **London Borough of Lambeth & Or v Corlett** [2006] UKEAT 039/06 now puts this in doubt.
33. Breach of contract claims are included in Schedule 3, but not in Schedule 4.

What constitutes a grievance?

34. A number of decisions have been made as to what constitutes a grievance. This issue is a mixed question of fact and law: **Martin v Class Security Installations Ltd** EAT/0188/06.

35. A Claimant can rely upon:
- (a) A resignation letter: ***Shergold v Fieldway Medical Centre*** [2006] IRLR 76;
 - (b) A letter threatening to resign: ***Galaxy Showers v Wilson*** [2006] IRLR 83
 - (c) A letter before action: ***Mark Warner Ltd v Aspland*** [2006] IRLR 87
 - (d) A without prejudice letter: ***Arnold Clark Automobiles v Stewart & Or*** [2005] UKEAT 052.05
 - (e) An application for flexible working: ***Commotion Limited v Ruddy*** [2006] IRLR 17
 - (f) But not discrimination questionnaires (Reg 14)
36. The contents of the letter also only need to be minimal, and need not particularise: ***Draper v Mears*** [2006] IRLR 86. In the context of a constructive dismissal complaint, a resignation letter need only state that the employee is leaving because of the employer's conduct: ***Martin v Class Security Installations Ltd*** UKEAT 0188/06.
37. The letter or relevant document will satisfy the requirement if there is a material similarity between it and the subsequent proceedings: per Burton J in ***Shergold***. The test was set out in ***Canary Wharf Management Ltd v Edebi*** [2006] IRLR 416 as whether the employer "on a fair reading and having regard to the particular context in which it is made" can be expected to appreciate that the relevant complaint is being made.
38. Where there is a new complaint about the way that the grievance has been handled, it may not be necessary to submit a new grievance: ***Galaxy Showers v Wilson***.

Discrimination / Dismissal Overlap

39. The EAT has now clearly held that the grievance procedure **does not** apply in those circumstances: ***Lawrence v HM Prison Service***. So, where an employee claims discrimination arising from a dismissal:
- she is under no obligation to lodge a step 1 grievance letter; and,
 - she is not entitled to a three month extension of time under regulation 15(3).

Modified Grievance Procedure

40. The modified procedure applies where:
- (a) The employee has ceased to be employed by the employer
 - (b) The employer was unaware of the grievance before the employment ceased, or the standard procedure was not commenced or completed before the last day of the employee's employment; and
 - (c) The parties have agreed in writing that the modified procedure should apply.
41. In **City of Bradford v Pratt** it was made clear that there are higher requirements to be satisfied by an employee to satisfactorily comply with Step I in the modified procedure. The employee must set out in writing the grievance **and the basis for it** (emphasis added).

Time limits

42. A claim cannot put in earlier than the 28 day time limit even if the procedure has been completed: **Exel Management Ltd v Lumb** EAT/0121/06.
43. It is necessary to wait 28 clear days before submitting Tribunal form e.g. if the letter of grievance is received on a Monday, the ET1 cannot be submitted before four weeks on the Tuesday.
44. The procedure of staying claims pending submitting a grievance is not correct (per Elias P): **London Borough of Hounslow v Miller**.
45. A grievance letter can be sent before the effective date of termination and still be valid: The main case is **HM Prison Service v Barula**, and the reasoning was affirmed then in **Lewisham v Colbourne**.
46. The three month time extension is three months and not three months less one day (so a grievance letter sent on 20 June 05 for constructive dismissal, a claim is valid if submitted on or before 20 December 2005): **Rainbow International v Taylor**.

Remedies

47. ***Ingram v Bristol Street Parts***, the Tribunal erred by ordering a nil basic award on the grounds of a 100% reduction. Section 120(1A) provides for a minimum four-week basic award to be calculated after any reduction for contribution.
48. In ***Metrobus Ltd v Cooke*** the Tribunal allowed a 40% uplift where a large employer "blatantly failed to comply" with the obligation to send a step 1 letter. The test on appeal is one of perversity.

Postscript

Finally, all of this may be about to change, as the Government has issued a consultation on the 2004 Regulations, and particularly whether to abolish them! The report can be found at <http://www.dti.gov.uk/files/file38516.pdf>, and the consultation document at <http://www.dti.gov.uk/files/file38553.pdf>. Responses to the consultation need to be submitted by 20th June 2007.

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Thomas More Chambers
10th May 2007

54. The following principles emerge from these cases:

- (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
- (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
- (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
- (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
- (5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
- (6) The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.
- (7) Having considered the evidence, the Tribunal may determine
 - a. That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
 - b. That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
 - c. That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.
 - d. Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.