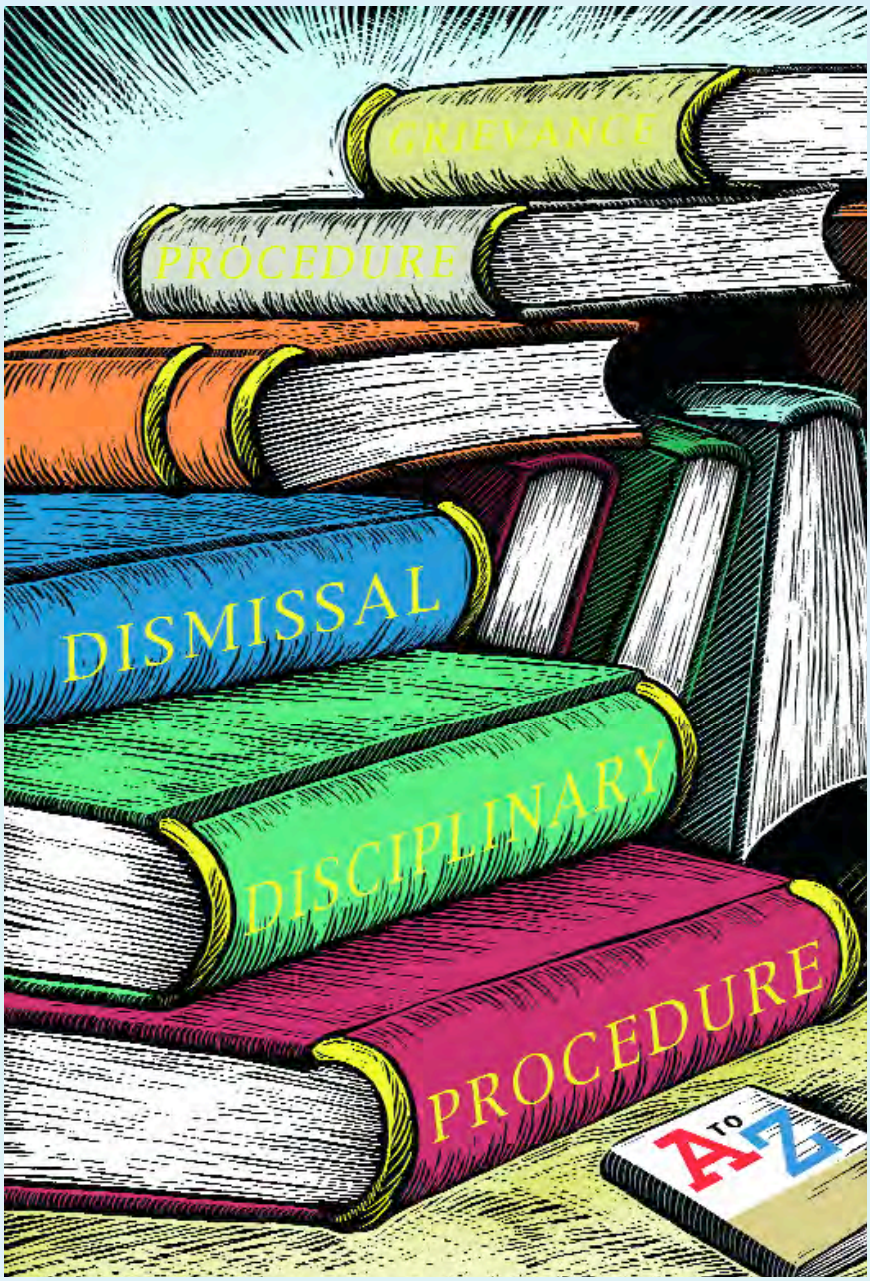
DISPUTE RESOLUTION

GUIDE TO THE NEW RULES



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DISPUTE RESOLUTION GRIEVANCES AND DISCIPLINARIES

In this supplement we look at the new rules that the Government is introducing this month (October 2004) on internal grievance and disciplinary procedures.

The Government argues they were needed to encourage employees to make better use of workplace dispute resolution procedures, before taking their claim to an employment tribunal. In reality, their aim (it seems to us) is to discourage tribunal applications by making it more difficult for employees to make a claim.

WHEN DO THE NEW RULES APPLY?

The rules apply from 1 October 2004, so any procedure that was started on or before 30 September will not be affected by them.

WHO IS COVERED BY THE NEW RULES?

They apply to employees only, not workers. In other words, anyone who has a contract of employment, written or oral.

WHAT DO THE NEW RULES COVER?

The new rules set out minimum procedures that employers and employees have to follow in cases involving discipline, dismissals and grievances. Failure to follow the new procedures will mean, in some instances, that employees are barred from bringing tribunal claims.

DISMISSAL AND DISCIPLINARY PROCEDURES

WHAT IS THE STANDARD PROCEDURE FOR AN EMPLOYER TO FOLLOW?

The standard procedure involves 3 steps:

Step 1: the employer gives you a written statement and invites you to a meeting

Step 2: the meeting takes place and the employer informs you of his or her decision and of your right to appeal

Step 3: you appeal, the appeal takes place and the employer informs you of the final decision

Under these rules, your employer cannot take disciplinary action against you (other than suspension with pay) before the first meeting. However, they can take action against you before the appeal hearing.

WHEN DOES THE STANDARD PROCEDURE APPLY?

The new dismissal and disciplinary procedures (DDPs) apply if your employer is thinking about dismissing you for any reason.

If, however, your employer is thinking about disciplining you, the new procedure only applies if it has to do with your conduct or capability to do the job. This is 'relevant disciplinary action' or RDA.

WHAT IS THE MODIFIED PROCEDURE?

There are two steps to the modified DDP:

Step 1: your employer gives you a written statement of the gross misconduct that led to the dismissal

Step 2: you appeal and after a hearing the employer informs you of the final decision

WHEN DOES THE MODIFIED PROCEDURE APPLY?

This applies if you have been dismissed without notice because of your gross misconduct. The dismissal must take place more or less on the spot, and it must be reasonable for your employer to have taken that kind of drastic action without any investigation and without giving you any notice.

So this applies only in extremely rare cases.

WHAT IS EXCLUDED UNDER THE DDPs?

The new procedures do not apply to oral and written warnings (strange, but true), nor to circumstances in which you are suspended on full pay (not usually seen as a disciplinary sanction in itself), just suspensions on reduced pay or no pay. Equally, they do not apply to constructive dismissals.

In addition, the DDPs will not apply to:

- The dismissal and immediate re-engagement of a whole category of employees
- Collective redundancies of 20 or more employees within 90 days
- Almost all dismissals as a result of industrial action
- Sudden and unforeseen closure of the employer's business
- Dismissals where continued employment of the employee would be illegal
- The modified DDP would apply but the employee lodges a tribunal claim before the employer sends the statement of reasons

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The requirement to follow the statutory procedure will also not apply if:

- You or your employer have reasonable grounds to believe that you (or anyone else) or your property might be threatened as a result
- You or your employer have been harassed and following the procedure would result in more harassment
- It is not practical to start the procedure, eg because of illness or the closure of the employer's business

IN WHAT CIRCUMSTANCES ARE THE PROCEDURES DEEMED TO HAVE BEEN COMPLETED?

There are three circumstances in which the DDP is automatically deemed to have been completed:

- In trade union victimisation cases, if you apply for interim relief within seven days of the dismissal and before the appeal stage has been completed. In other words, if you ask a tribunal to ascertain your chances of success at the full hearing and to make an order of reinstatement, re-engagement or temporary continuation of the contract in the interim period
- If you appeal to another body (not your employer) under an 'appropriate procedure' that has been collectively agreed between your trade union and the employer. You must complete steps one and two of the DDP
- Where, after the DDP has started, you or your employer have reasonable grounds to believe that you (or anyone else) or your property might be threatened as a result; you or your employer have been harassed and following the procedure would result in more harassment; or it is not practical to start the procedure, for instance because of illness or the closure of the employer's business

HOW HAS THE PROCEDURAL UNFAIRNESS RULE BEEN AFFECTED?

In the famous case of *Polkey -V- AE Dayton Services Ltd*, the House of Lords said that although generally, employers had to follow proper procedures prior to dismissal, there was one – very narrow – exception when it is reasonable not to.

That was when an employer, in the light of everything that they knew at the time, decided that it would have been completely 'futile' to follow the procedure because it would not have made any difference to the outcome.

That approach has now been abandoned. The rule, from here on, is that if your employer fails to complete all the requirements of the DDP, any dismissal will be automatically unfair.

However, just to confuse things, there is still a let-out clause for employers who do complete every stage of the statutory DPP, but who don't comply with an additional procedure that would have been reasonable to follow, such as something from the ACAS code or their own staff handbook.

In those circumstances, the dismissal may still be fair if the employer can show that following that additional procedure would have made no difference to the outcome and that the dismissal was substantively fair.

If the DDP is not applicable, the employer can again argue that following ACAS procedures makes no difference.

HOW ARE TIME LIMITS AFFECTED?

If an employee wants to bring a claim to which a DDP applies, the normal time limit for bringing a tribunal claim is extended by three months. This is dependent, however, on your being able to show that you had reasonable grounds for believing that a dismissal or disciplinary procedure (whether statutory or otherwise) was ongoing.

But note that the tribunal time limit for lodging a claim (say, three months) will not be extended if the relevant disciplinary procedure is completed within that three month period, unless again you can show you had reasonable grounds for believing that it was still ongoing.

GRIEVANCES

WHAT IS A GRIEVANCE?

A grievance is defined in the legislation as *'a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him (sic)'*.

WHAT IS THE STANDARD GRIEVANCE PROCEDURE?

The standard grievance procedure (GP) consists of three steps:

Step 1: you give the written grievance to your employer (nb: a discrimination questionnaire cannot double up as a step 1 grievance letter)

Step 2: your employer invites you to a meeting and informs you of the decision and of your right to appeal

Step 3: you appeal and your employer informs you of the final decision

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WHEN DOES THE STANDARD GP APPLY?

The standard GP applies to any grievance about an act or omission taken or contemplated by your employer in relation to you that could form the basis of a tribunal complaint.

The GP does not apply to grievances about a direct dismissal, but it does apply to constructive dismissals.

WHAT IS THE MODIFIED GRIEVANCE PROCEDURE?

This consists of two steps:

Step 1: you give the written grievance to your employer

Step 2: your employer gives a written response to you, without any meeting taking place

WHEN DOES THE MODIFIED GP APPLY?

This applies when you have left your job and your employer was not aware of the grievance at that point in time. Either that or your employer was aware of the grievance, but the procedure had either not started or had not finished by the time you left.

Both of you have to agree to the modified procedure, otherwise the standard grievance procedure applies.

The requirement to invoke the grievance procedure does not apply if it is just not practical for employees to start off the process, once they have left their job.

WHAT IS EXCLUDED UNDER THE GP?

The GP does not apply in the following cases:

- If you are no longer employed and it is not reasonably practical for you to write the step one grievance letter
- If your grievance is about an actual dismissal or one that is being contemplated (but not a constructive dismissal)

The requirement to follow the statutory procedure also does not apply if:

- You or your employer have reasonable grounds to believe that you (or anyone else) or your property might be threatened as a result
- You or your employer have been harassed and following the procedure would result in more harassment
- It is not practical to start the procedure, for instance because of illness or the closure of the employer's business

WHEN IS THE GP DEEMED TO HAVE BEEN COMPLIED WITH?

There are five circumstances in which the standard GP is deemed to have been complied with.

The first applies if:

- You are no longer employed by that employer
- You sent in your grievance letter, and
- You can no longer comply with the remaining requirements of the procedure because it is just not practical for you to do so

Your employer should also have responded in writing to your grievance, and you should have made every effort to attend any meeting they may have arranged to discuss it. If the first meeting has taken place, your employer must notify you of the outcome of the grievance.

The second applies if your employer is taking RDA against you that you claim is discriminatory, or not based on your conduct or capability. In that case you must lodge a written grievance with your employer before the DDP meeting or appeal. If your employer is not following a DDP, you still have to lodge the grievance before filing your tribunal claim.

The third circumstance applies if your trade union official (or staff representative if the union is not recognised) has raised a written grievance on behalf of two or more named employees. The GP is, however, only deemed to have been complied with for the employees named in the grievance, so officials need to be sure that they name everyone.

The fourth applies where, after the GP has started:

- You or your employer have reasonable grounds to believe that you (or anyone else) or your property might be threatened as a result
- You or your employer have been harassed and following the procedure would result in more harassment or
- It is not practical to start the procedure, for instance because of illness or the closure of the employer's business

Finally, both sides will be deemed to have complied with the GP if you raise the grievance under a procedure agreed between an independent trade union and two or more employers or an employer's federation.

WHAT TIME LIMITS APPLY?

When a statutory GP applies, you will

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get an automatic three month extension to the normal tribunal time limit if:

- you submitted a claim within the normal time limit, but failed to send the step 1 letter. You then have to submit the step 1 letter within 1 month of the expiry of the normal time limit and re-submit the ET1 (the tribunal application form) to the tribunal within 3 months
- you sent the step 1 letter but did not wait 28 days, in which case you have to wait for the end of the 28-day period before you can resubmit the claim (which has to be within 3 months of the normal time limit)
- you sent the step 1 letter within the usual time limit and submitted a claim within 3 months of that limit

HOW ARE WHISTLEBLOWERS PROTECTED?

If you decide to make a protected disclosure, it is up to you to decide whether or not to use the whistleblowing law or to use the GP.

Once you decide which to follow, you will have to follow it through – you will not be able to change horses mid-stream.

GPs AND DDPs

WHAT PRINCIPLES APPLY TO BOTH PROCEDURES?

At each stage, you and your employer must take action without unreasonable delay; the timing and location of meetings must be reasonable; the meetings must be conducted so that each side can explain their case; and if possible, appeals should be heard by a more senior manager than the one who attended the first meeting.

HOW DO THE NEW RULES AFFECT THE RIGHT TO BE ACCOMPANIED?

Under the new rules, as long as you can show that the meeting is a disciplinary or grievance hearing, you will have the right to be accompanied. This means that you can postpone a meeting once, but only once, for up to five days if your companion cannot attend.

If the reason that one of you could not attend was not foreseeable at the time the meeting was arranged, this does not count as a breach. If it is not reasonably practical for someone to attend a subsequent meeting, then everyone is released from their obligations under the procedure and no longer have to follow it.

If you do not take all reasonable steps to attend one of the meetings under the statutory procedure, you will be in breach of that procedure and your employer is released from all obligations under the system. Because you are at fault, you risk having your compensation reduced by a tribunal.

WHICH PROCEDURE SHOULD YOU FOLLOW WHEN?

If your employer dismisses you, you should appeal under the disciplinary procedure. If, however, you intend to leave your job and complain that you have been constructively dismissed, you should use grievance procedure.

If you are aggrieved about your employer taking 'relevant disciplinary action' short of dismissal against you (excluding paid suspension or a warning), you should appeal under the standard DDP.

However if you think the RDA has nothing to do with your conduct or capability or is discriminatory, you should follow the DDP appeal route and raise a grievance. Note that if you trigger the GP before you've had the DDP appeal hearing, you will be deemed to have complied with the rest of the GP. On the other hand, if you trigger it at or after the DDP appeal hearing, you have to follow the full GP (as well as the DDP appeal stage).

If the disciplinary action consists of an oral or written warning or a suspension (in which case the DDP does not apply), you have to follow the applicable GP in the usual way.

In all other cases, you should use the full grievance procedure.

COMPENSATION

If you fail to follow or complete an applicable DDP or GP, the tribunal will reduce your award by 10-50 per cent. If your employer is the guilty party, then your compensation will be similarly increased.

In unfair dismissal cases, these adjustments only affect the compensatory award, not the basic award. You will get a minimum basic award of four weeks' pay if it was because of the employer's failure to complete an applicable DDP.

TRIBUNAL JURISDICTIONS TO WHICH THE NEW PROCEDURES APPLY

Section 2 Equal Pay Act 1970 (c 41) – equality clauses

Section 63 Sex Discrimination Act 1975 (c 65) – discrimination in the employment field

Section 54 Race Relations Act 1976 (c 74) – discrimination in the employment field

Section 146 Trade Union and Labour Relations (Consolidation) Act 1992 (c 52) – detriment in relation to trade union membership and activities; Paragraph 156 of Schedule A1 – detriment in relation to union recognition rights

Section 8 Disability Discrimination Act 1995 [Section 17A Disability Discrimination Act 1995] (c 50) – discrimination in the employment field

Section 23 Employment Rights Act 1996 (c 18) – unauthorised deductions and payments; Section 48 – detriment in employment; Section 111 - unfair dismissal; Section 163 – redundancy payments

Section 24 National Minimum Wage Act 1998 (c 39) – detriment in relation to national minimum wage

The Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) – breach of employment contract and termination; the Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994 (SI 1994/1624) (corresponding provision for Scotland)

Working Time Regulations 1998, regulation 30(SI 1998/1833) – breach of regulations

Transnational Information and Consultation of Employees Regulations 1999, regulation 32 (SI 1999/3323) – detriment relating to European Works Councils

Employment Equality (Sexual Orientation) Regulations 2003, regulation 28 – discrimination in the employment field

Employment Equality (Religion or Belief) Regulations 2003, regulation 28 -discrimination in the employment field

CLAIMS EXCLUDED FROM OPERATION OF DISPUTE RESOLUTION

TULR Act 1992	
s.68A	Unauthorised check-off deduction
s.137	Refusal of employment on TU (non) membership grounds
ss.168-170	(Paid) time off for TU/Learning Rep duties/activities
s.183	TU complaint of failure to disclose information for CB
ss.189 & 192	Protective award and entitlement in collective redundancies
Pension Schemes Act 1993	
s.124	SoS failure to pay unpaid contributions to insolvent scheme
ER Act 1996	
s.11	Failure to provide accurate written particulars
s.34	Failure to pay guarantee payment
s.51	Time off for public duties
s.54	Paid TO to look for work during redundancy notice
s.57	Paid TO for ante-natal care
s.57B	Paid TO for dependants
s.60	Paid TO for pension scheme trustees
s.63	Paid TO for TU/Employee representatives
s.63B	Paid TO for young person to study/train
s.70	Remuneration when suspended on medical/maternity grounds
s.80	Parental leave
s.80H	Flexible working
s.93	Failure to provide written reasons for dismissal
s.188	SoS failure to make a payment on employer's insolvency
ER Act 1999	
s.11	Right to be accompanied
Safety Reps etc Regs 1977	
Reg 11	Paid TO for safety rep
TUPE 1981	
Reg 11	Failure to inform/consult
Health & Safety (Consultation etc) Regs 1996	
Sch 2	Paid TO for training
Transnational Information & Consultation Regs 1999	
Reg 27	Paid TO
Part-Time Workers etc Regs 2000	
Reg 8	Less favourable treatment & detriment
Fixed-Term Employees etc Regs 2002	
Reg 7	Less favourable treatment & detriment
Flexible Working etc Regs 2002	
Reg 15	Right to be accompanied & postpone a meeting