

Grievance procedures

This client guide focuses on some of the legal implications that arise from having, or not having a grievance procedure, how such procedures should operate, and recent changes in the law.

Why have a grievance procedure?

Grievance procedures should provide an open and fair way for employees to make known their concerns and enable grievances to be resolved quickly before they become major difficulties.

Such procedures can also provide a useful method of identifying difficulties in areas such as discrimination and public interest disclosures, both of which are subject to legal redress that could have substantial and far reaching effects on an employer.

What should the procedure include?

The written particulars of terms and conditions of employment that every employee should receive under the provisions of the Employment Rights Act 1996 must contain a statement relating to grievance procedures. There is no exemption for small employers.

Any grievance procedure must comply with the revised version of the ACAS Code of Practice on Disciplinary and Grievance Procedures which came into effect on 6 April 2009. In addition, it is recommended that it still complies with the minimum statutory grievance procedures (see below), although these procedures were repealed on 6 April 2009. However, the statutory grievance procedures will continue to apply to many cases throughout 2009 and possibly into 2010, because transitional provisions provide that, if the events giving rise to the grievance started or occurred before 6 April 2009, the minimum statutory procedure will be engaged (subject to final cut off dates). Failure to comply with the statutory grievance procedure where it applies could lead to an increase in any award by an Employment Tribunal of up to 50%. Where the statutory procedure does not apply, an unreasonable failure to comply with the revised ACAS Code of Practice could lead to an increase in any award of up to 25%.

Under the revised ACAS Code of Practice it is vital that such a grievance procedure is properly notified to your employees and that effective training is provided to managers in how it should be operated. Any published procedure must then be operated effectively.

If an employment contract contains a grievance procedure that is contractual then an employer who does not comply with that procedure will be in breach of contract. Such a breach could lead to resignation and a claim for constructive dismissal.

In addition, every contract of employment contains an implied term that both parties will not act in such a way as to breach mutual trust and confidence. It has been argued that because of this there is an implied term that employers should take grievances seriously and should, therefore, provide a reasonable opportunity to their employees to obtain redress for any grievance they may have. This means that a failure to take any grievance seriously may amount to a fundamental breach of contract or an act of discrimination by the employer.

The object of any grievance procedure should be to ensure that employees' grievances are dealt with quickly, fairly and consistently, and at the lowest appropriate level within the work place at which the matter can be resolved satisfactorily.

Such a procedure should enable employees to raise issues about their work, their employers and fellow employees. Some of the areas that can give rise to grievance issues are:

- terms and conditions of employment
- health and safety
- relationships at work, eg harassment, bullying, new working practices, re-organisation
- equal opportunities

The number of stages within such a procedure will depend on the size of any employer, its structure and resources.

The stages of the procedure will, basically, take the employee through various levels of management. It is important to provide realistic time limits and departure from those limits should only be in exceptional circumstances. It may well be necessary to write separate policies or, to have separate arrangements, in respect of different categories of case. This may be appropriate for matters of public disclosure, bullying and harassment. Any action taken against an employee because he or she has brought a complaint under the grievance procedure may amount to unlawful victimisation.

It is particularly important that records are kept in respect of any grievance. Any such records should be confidential and processed in accordance with the Data Protection Act 1998. It is our recommendation that in grievance procedures the employee who has brought the grievance should be provided with copies of notes of meetings at every stage of the procedure unless there are exceptional circumstances that dictate otherwise.

The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out how grievances should be dealt with and will be used by employment tribunals in reaching decisions on fair procedure.

The employee's right to be accompanied at grievance hearings

Where the grievance relates to a breach of duty by the employer in relation to the worker concerned, the worker has a statutory right to be accompanied by either a fellow worker or a trade union official. The role of the companion will be limited to addressing the hearing to put the employee's case, responding to views expressed and conferring with the employee, but he/she may not answer questions on the employee's behalf.

This right to be accompanied is not limited to employees but applies to all workers, including someone providing services personally under a contract with another party who is not their client or customer, agency workers, home workers and those in Crown employment (other than in the armed services).

The right to be accompanied applies only to grievance hearings which concern the performance of a duty by the employer in relation to the worker. This will clearly cover any contractual or statutory duties e.g. changes to a worker's contract, allegations of bullying or harassment, but it is unclear what else may be included. To avoid claims, employers should include the right to be accompanied in relation to any formal grievance hearings.

Whilst the employer may set the time and date of any grievance hearing, it is obliged to postpone it for up to five working days at the request of the employee if his/her chosen companion is unable to attend on the date first proposed by the employer.

Failure to comply with this right, or to agree a postponement, entitles the worker to make a complaint to a Tribunal and if this is upheld, he/she is entitled to an award of up to two weeks' pay. It is also likely to be deemed an unreasonable failure to comply with the ACAS Code of Practice with the resulting penalty increase.

Statutory grievance procedure

The statutory grievance procedure has been repealed for all cases where the events giving rise to the grievance commence on or after 6 April 2009. For cases where the events giving rise to the grievance took place or commenced before this date, the statutory procedure still applies (subject to final cut off dates). Where it applies, the compulsory statutory procedure is as follows:

Step 1: Statement of grievance

The employee must set out his/her grievance in writing and send this to the employer.

Step 2: Meeting

The employer must invite the employee to at least one meeting to discuss the grievance. The employee must take all reasonable steps to attend and must inform the employer of the basis for the grievance. After the meeting the employer must inform the employee of its decision and the employee's right to appeal.

Step 3: Appeal

If the employee wishes to appeal the employer must invite him to attend a further meeting which the employee must take all reasonable steps to attend. After the meeting the employer must inform the employee of its final decision.

There is a modified two-stage procedure for former employees. Employers should seek advice before relying on the modified procedure.

It should be noted that with regard to the statutory procedure, the courts have applied a very low threshold as to what constitutes a "grievance in writing". A resignation letter, a letter from an employee's solicitors, and even an employer's notes of a grievance meeting have been held to constitute grievances and it has also been determined that it is not necessary for the employee to make it plain that it is a grievance, or is an invocation of a grievance procedure. Most complaints in writing are likely to be considered grievances for the purposes of the statutory procedures. Similarly, if there are requirements in an internal procedure that are not reflected in the statutory procedure (such as setting out grounds for an appeal in writing), then an insistence on following the internal procedure could result in the employer failing to follow the statutory procedures and the employee receiving an uplift in award for a successful claim. Some tribunal claims may, however, be avoided as an employee cannot normally bring a claim if he/she has not first used the statutory grievance procedure.

If you are unsure as to whether an employee has raised a grievance, which procedure you should follow or how to deal with an appeal, we can advise you further.

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