

# Employment Law Update:

## What is a Grievance?

Since 1 October 2004, as a result of the Employment Act 2002, employers have been required to follow one of two statutory procedures when dealing with a grievance raised by an employee; the standard procedure or the modified procedure. If the employer fails to complete the procedure, an uplift (of up to 50%) in compensation awarded at subsequent Employment Tribunal claims relating to the substance of the grievance may be added. In effect, the consequences of failure to follow the procedures can be punitive.

The standard procedure is triggered when the employee sets out their grievance in writing and sends it to the employer. Substantial case law has been generated on the issue of what amounts to a written grievance for the purposes of initiating the standard grievance procedure and some of the decisions are surprising.

### Cooke v Secure Move Property Services Limited (April 2005)

C was subject to a disciplinary process for malpractice. In preparation for his hearing he wrote to the Operations Director requesting information to assist him in preparing his case, as follows: *"I am also extremely disappointed that there appears to be a conclusion that has already been reached that I have some how committed some kind of fraud or been dishonest in my dealings in some ways... I fail to see how the circumstances could lead to such an impression (i.e. fraud) and I am concerned that this whole investigation has been tainted by an element of bias*

*which means that I will not receive a fair hearing"*. It was held that these comments amounted to a grievance for the purposes of initiating the standard statutory procedure. It is clear that it is not necessary for an employee to make it explicit that they are submitting a grievance and that a statement of grievance may be contained within a communication that addresses other issues as well.

### Tudor v Lowburch Limited t/a Laurel Bank Support at Home (June 2005)

T resigned in January 2005 stating *"It is with regret that I now find myself in the unfortunate position of having to tender my resignation. I feel that I cannot work under the constant watchful eyes and not being trusted to undertake my job properly"*. The Tribunal decided that this alone did not constitute a grievance. T wrote again in February 2005 stating that she intended to make an Employment Tribunal claim and giving her reasons for this. She did not state that she wished to submit a formal grievance or use the word "grievance". In May 2005, the company's solicitor wrote to T asking her to confirm if her letter was a grievance and if so, suggesting a meeting be arranged. T responded with further details of her claim but did not specifically respond as to whether her letter was a statement of grievance or not. The solicitor again sought clarification and suggested a date for the grievance meeting. T replied that she would not attend the hearing. Again, she did not confirm whether her letter was a grievance. It was held by the Tribunal that, for the

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statutory standard grievance procedure to be initiated, the word "grievance" does not need to be used in a statement of grievance, there is no requirement for the employee to intend that their statement be treated as a statutory grievance and neither is there a requirement that the employee attends a grievance hearing. It should also be noted that there is no requirement that the grievance precedes the date of termination of employment. The consequence of T not attending the grievance hearing is that she (not her employer) has failed to follow the statutory procedure and therefore any compensation awarded by the Tribunal in respect of claims to which the grievance related may be decreased by 10% to 50%.

*Bowen v Moss Pharmacy & Clarins (UK) Limited (June 2005)*

B wrote to her Manager detailing the facts of a dispute with her co-workers. A copy of the letter was not kept by B and the copy she sent to her Manager was lost so it was not clear exactly what she wrote. It was decided that although the grievance was about acts of third parties and therefore not an action which the employer has taken or is contemplating taking in relation to the employee, it was still a grievance. Although the letter was sent to her Manager's home address, it was sent with sales statistics which B submitted on a regular basis. It was therefore held by the Tribunal that this was not a personal letter and

was instead a statement of grievance sent to the employer.

*Commotion Limited v Ruffy (October 2005)*

R made an informal request to be allowed to work part time. This was rejected. She then submitted a formal flexible working request in line with section 80(f) of the Employment Rights Act 1996. Again, her application was rejected on the grounds that there would be a detrimental impact on the performance of the warehouse in which R worked. R appealed but her appeal was rejected. R then resigned stating in her resignation letter "As you know, I have raised this matter as a grievance with you and I believe that you have breached the contract between us". The statutory regime states that when determining whether a written communication fulfils the requirements of a statement of grievance, it is irrelevant whether the communication deals with any other matter. It was therefore held that the flexible working request also amounted to a grievance triggering the statutory procedure. As R's informal request for flexible working had been rejected, it was held that she had a grievance at the time she submitted her formal request. From this case it is apparent that the Tribunal will interpret the conditions of the statutory procedure widely. However, due to the specific facts of this case, it may be possible to distinguish this particular decision in future cases so arguably not all

flexible working requests will also be sufficient for the purposes of the statutory grievance procedure. Nevertheless, this decision does highlight the need for employers to take a cautious approach.

*Thorpe & Soleil Investments Limited v Poat & Lake (October 2005)*

P and L were employed as House Manager and Estate Manager. They submitted a lengthy letter of complaint to their employer including the lack of a hygienic working environment and stated their intention to resign. It was held to amount to a grievance. The employer's grievance procedure stated that grievances should be sent to a specific individual, which P and L did not do. It was held that a company's grievance procedure, if any such procedure exists, is not relevant when determining whether the statutory procedure is applicable and therefore the statement had been validly submitted. It is clear that the statutory grievance procedure and a company's grievance policy are distinct and should be considered separately.

*Aspland v Mark Warner Limited (December 2005)*

A was employed as Sales Manager. A lawyer at a Citizens Advice Bureau wrote to the employer's solicitor on A's behalf in December 2004 and January 2005 setting out complaints connected to A's employment and warning the employer of A's intention to commence legal proceedings,

i.e. "letters before action". The Tribunal held that these letters constituted a grievance. There is nothing in the statutory procedure that specifies the employee must write and submit the grievance themselves and therefore it is possible for an agent (e.g. a solicitor) to submit the grievance on the employee's behalf. Further, when sending a statement to the agent of the employer it is deemed to have been sent to the employer. It should also be noted that it is necessary to look at the sequence of correspondence, rather than one individual communication, as the letters together constituted a written grievance.

*Holc-Gale v Makers UK Limited (December 2005)*

H served an equal pay questionnaire on her employer. The questionnaire followed the usual standard format; section one set out statements of facts and complaints and section two listed specific questions designed to determine whether the facts complained of showed that the employer was in breach of the Equal Pay Act 1970. The form was entitled "The Complainant's Questions to the Respondent". The Tribunal accepted that the statements in the questionnaire do constitute a grievance but went on to state that they are excluded from that characterization by the provisions of Regulation 14 of the statutory grievance procedure. This Regulation states that questions to obtain information are not a statement of grievance for the purpose of the

statutory grievance procedure and it was also held that no distinction between section one and section two of the questionnaire should be made. Anti-discrimination questionnaires do not therefore constitute a grievance under the statutory procedure.

To conclude...

Employers should consider the following points when trying to determine whether a grievance has been submitted and whether compliance with the statutory standard grievance procedure is required:

- ◆ There is no prescribed form that a statement of grievance must take, although it must be in writing;
- ◆ A grievance may be contained within a resignation letter, a letter before action from an employer's legal representative (even if it is sent on a 'without prejudice' basis) or a flexible working request as well as various other written forms of communication;
- ◆ If the communication includes information about other matters, it does not prohibit it from being a statement of grievance;
- ◆ There is no requirement that the statement of grievance be submitted by the employee personally, instead the employee's agent can submit it on the employee's behalf;
- ◆ The statement of grievance may be sent to the employer or the employer's agent and it does not need to be sent to the person specified in

the employer's grievance procedure, if such policy exists;

- ◆ There is no requirement for the statement to expressly use the word "grievance" or indicate that it is intended to invoke the grievance procedure;
- ◆ A grievance can be submitted even after the employee has resigned;
- ◆ It is possible to submit a grievance about the way a previous grievance investigation or disciplinary process has been handled; and
- ◆ Anti-discrimination questionnaires are excluded from being a grievance for the purposes of the statutory grievance procedures.

If there is any doubt as to whether a grievance has been submitted, it is advisable for employers to err on the side of caution by treating the complaint as a grievance. If employers do not recognise that a grievance has been submitted, and therefore do not react appropriately, they expose themselves to the possibility of uplifted compensation in subsequent Employment Tribunal proceedings brought by the employee of between 10% and 50%.

For further advice on compliance with the statutory grievance procedure, or any other aspect of employment law, please do not hesitate to contact the Employment Department at Goodman Derrick on 020 7404 0606 or at [mail@gdlaw.co.uk](mailto:mail@gdlaw.co.uk)

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