

Showing grievance

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Rules and procedures in employment tribunals have become hugely baffling. Kerry Underwood and Elish McKee navigate the confusion

Until recently, a simple letter to an employment tribunal constituted a valid application, provided it contained certain basic information and was in time.

Now the rules and procedures to be followed before a case can be accepted by the tribunal are baffling even the most experienced specialist employment lawyers.

This government has presented no fewer than 89 Statutory Instruments and 28 Acts of Parliament in the employment field since coming to power in 1997.

The Employment Act 2002 and the Employment Act (Dispute Resolution Regulations) 2004 changed the procedure for presenting claims to the employment tribunals.

Section 111(2) of the Employment Rights Act 1996 provides for a three-month time limit.

However, when a claim is listed in Sched 4 to that Act, the grievance procedures apply (s 32 Employment Act 2002). A claim can not be presented to the tribunal before a period of 28 days has passed after the employee has lodged a grievance and the time for presentation to the tribunal is extended to six months (reg 15(1) of the Employment Act (Dispute Resolution) Regulations 2004).

In practice, failure to satisfy the statutory grievance procedures has prevented many claimants from securing access to justice as the tribunal does not then have jurisdiction to hear their claim. Employment Appeal Tribunal president, Mr Justice Elias, said in *Canary Wharf Management Ltd v Edebi* [2006] IRLR 416:

“These are complex and not happily constructed regulations [that] operate in a harsh way.”

Mr Justice Burton did not allow “pernickety criticism of the form or content” of a grievance as this “can result in an employee being barred from the judgement seat entirely...” in *Shergold v Fieldway Medical Centre* [2006] IRLR 76

The first problem has been when the grievance procedure applies at all. Section 32(2) of the Employment Act 2002 states:

An employee shall not present a complaint to an employment tribunal under a jurisdiction to which this section applies if:

- (a) it concerns a matter to which the requirement in para 6 or 9 of Sched 2 applies, and
- (b) the requirement has not been complied with.”

Paragraphs 6 and 9 of Sched 2 provide for the grievance to be set out in writing.

Schedule 4 lists the claims for which a grievance must be raised, and includes s 111 of the Employment Rights Act 1996.

However, reg 6(5) states that: “Neither of the grievance procedures applies where the grievance is that the employer has dismissed or is contemplating dismissing the employee.” As a matter of constitutional law, although the Employment Act 2002 gives the power for regulations to be made under the Act, regulations can not amend an Act of Parliament.

Section 51 of the Employment Act 2002 provides that:

“(1) Any power of the Secretary of State to make orders or regulations under this Act includes power:

- (a) to make different provision for different cases or circumstances
- (b) to make such incidental, supplementary, consequential or transitional provision as the Secretary of State thinks fit.

(2) Any power of the Secretary of State to make orders or regulations under this Act is exercisable by statutory instrument.

(3) No order may be made under this Act unless a draft of the order has been laid before and approved by resolution of each House of Parliament.

(4) No regulations may be made under ss 30, 31, 32, 33 or 45 unless a draft of the regulations has been laid before and approved by resolution of each House of Parliament.”

Therefore, there is no statutory authority for the Regulations to amend the Act.

The doctrine of implied repeal means any later Act of Parliament that is inconsistent with an earlier Act will be taken to impliedly repeal the earlier Act and the new Act will be the correct statement of law. This is not the case with a later set of Regulations that are inconsistent with an Act of Parliament.

However, the case law seems to suggest that this change has been accepted. For an interesting case that indirectly refers to this point see *Hamilton v DHL Express (UK) Ltd*, ET No 2401120/2005. The claimant claimed sex discrimination after her dismissal for gross misconduct. The basis of the sex discrimination claim was that male employees had not been dismissed in similar circumstances. The tribunal held that because the only basis of the sex discrimination claim was the dismissal then by reason of reg 6(5),

the statutory grievance procedure did not apply. This case ignores the fact that the employer can mitigate the loss to the client by reviewing procedures, apologising and rectifying their mistakes.

Thus in an unfair dismissal claim, plus a claim where the grievance procedure applies, the unfair dismissal part of the claim must be with the tribunal within the three-month time limit. Where 28 days following the grievance has not expired, you must issue that part of the claim afterwards and ask the tribunal to join the claims. The 28-day waiting period existing even when the grievance has been dealt with has been criticised in *Exel Management v Lumb* EAT 0121/2006 because the whole point is to allow the employer time to deal with the grievance. It is pointless to have to wait before lodging the claim when the grievance has been dealt with by the employer.

A claim against a co-worker must be lodged within three months, even if the time is extended for the claim against the employer following the grievance being raised (*Bisset v Martins* EAT 0022-23/2006).

The Employment Act 2002 states: “The employee must set out the grievance in writing and send the statement or a copy of it to the employer.”

The following have been found to be a valid grievance for the purposes of the procedures, thereby allowing the tribunal to hear the claim.

1. Letters marked ‘without prejudice’ as in *Arnold Clark Automobiles Ltd v (1) Stewart (2) Bernetts Motor Group* (Unreported, 20 December 2005). This case provided that an employee only needs to put down, in writing, enough information so that the employer is aware of the actual or apprehended conduct the employee is complaining about. There is not a requirement for a specific format.

2. A solicitor’s letter can be a valid grievance (*Mark Warner Ltd v Aspland* [2006] IRLR 87).

3. A letter written by a claimant’s chiropractor detailing the adjustments required was found to be a valid grievance (*Chard v Telewest Communications Plc* ET 1401078/2005 and 1401786/2005).

4. Resignation letters as in *(1)Thorpe (2) Soleil Investments Ltd v (1) Poat (2) Lake* EAT 0503/05, 18 October 2005 and *Shergold*.

5. Complaint letters – see *Galaxy Showers Ltd v Wilson* [2006] IRLR 83, in which the employee wrote to his employer setting out his complaints indicating that, unless they were resolved, he would resign. The employer failed to take any action in respect of this letter and the employee resigned. The EAT found this to be a grievance letter and ruled the grievance does not have to go any further than to complain about what the employer has or has not done.

This relaxed approach to the content and form of a grievance is being extended to the dismissal and disciplinary procedures. In *Draper v Mears Ltd* [2006] IRLR 869, the tribunal found that the letter to the employee which set out the complaint against him as

“conduct which fails reasonably to ensure health and safety of oneself and others”, was enough to satisfy step one of the dismissal and disciplinary procedure when the conduct was that the claimant had consumed alcohol when intending to drive a company vehicle.

As regards grievances, while technical language does not need to be used, in *Canary Wharf Management Ltd v Edebi* [2006] IRLR 416, it was held that, although the claimant sent a lengthy letter talking about his health problems and the working conditions, the letter could not, even in an unsophisticated non-technical way, be found to alert the employers that there was an issue under the Disability Discrimination Act.

Regulation 14 states that a discrimination questionnaire can not be a valid grievance. *Holc-Gale v Makers Ltd* [2006] IRLR 178 argued the point that, while the questions could not constitute a grievance, the introductory statements to the questionnaire could, but this failed in the EAT. The list of exclusions in reg 14 does not include questionnaires under the Age Discrimination Act 2006, as there was no amendment to the Regulations following this Act coming into force. As the law stands, an Age Discrimination Act questionnaire could be a valid grievance.

The timing of the grievance is the next problem. If the grievance procedure applies, a grievance must be raised within four months and an application to the tribunal cannot be made until 28 days have passed before doing so. However, you get an extension of a further three months “beginning with the day after the day on which it would otherwise have expired”. By my calculation, and that of the tribunal in *Singh (trading as Rainbow International) v Taylor* [2006] EAT/0183/06 MAA (Unreported), this will make the time limit for claims to which the grievance procedure applies six months from the date of the act complained of – not six months less a day. There is still some argument about this, and it is safer to work towards a six-month less a day limitation.

The time limit for raising a grievance is four months: see s 32(4)(b) of the Employment Act 2002, which provides that a complaint can not be made to an employment tribunal if the “day on which the requirement was complied with was more than one month after the end of the original time limit for making the application”. So as long as a client’s claim is one that is listed in the schedule to the Employment Act 2002, it can be revived even though the initial three-month time limit has passed!

Where a grievance has not been raised within four months, this is not necessarily fatal to the claim. The tribunal’s power to allow a claim in out of time under the ‘just and equitable’ provisions for discrimination claims has not been overridden by this requirement to raise a grievance. Surprisingly, in *BUPA Care Homes v Cann* [2006] IRLR 248, the chairman found that the claimant had raised a grievance at the pre-hearing review and the EAT commented that they would have upheld that point if it had been necessary.

The grievance procedure does apply to constructive unfair dismissal claims. As we have seen, the regulations provide that all you have to do to get the three-month extension to six months is to write a grievance letter and the case law provides that a resignation letter can be a grievance. However, in a recent pre-hearing review for

Cheryl Weale v CfBT Education Trust, case number 2701492/2006 in Reading Employment Tribunal, the chairman, Mr Byrne found that, where the grievance had been raised and dealt with before the effective date of termination in a constructive unfair dismissal claim, that there is no extension to the time limit. His interpretation was that, as a grievance must be raised “within the normal time limit” in cases of constructive unfair dismissal, the period for this begins with the effective date of termination due to the wording of s 111(2)(a) of the Employment Rights Act 1996. This decision did not take into account s111(3) which will bring the notice period within the normal time limit. But take heed. If your client’s grievance was dealt with before the EDT, do not rely on the extension of time. Yet.

Another controversial first instance decision relating to constructive unfair dismissal was in *Cooke v Secure Move Property Services Ltd* Case No: 2400449/2005. Here the claimant resigned while being investigated for gross misconduct, saying that his position was untenable because of this. At a pre-hearing review, the employers argued that the tribunal did not have jurisdiction to hear the claim because a grievance had not been raised, but the chairman found that the claimant did not have to raise a grievance because the only grievance was that the employer had contemplated dismissing or taking other disciplinary action against him, so regs 6(5) and (6) applied to make this exempt.

Failure to appeal will result in a mandatory reduction of 10 per cent and the possibility of a 50 per cent reduction in any award made by the tribunal (s 32 of the Employment Act 2002).

The dismissal and disciplinary procedure should not be confused with the grievance procedure as the tribunal did in *Shergold*. A failure to carry out an appeal hearing from the grievance does not make any dismissal automatically unfair. That only applies to breaches of the dismissal and disciplinary procedure.

Grievance procedures are preventing people from even managing to get their claims heard – but what about Art 6? It is no secret that anything that is technically difficult is going to discriminate against the most vulnerable people in society. People will be left without a remedy because they don’t understand the procedures and either can’t afford to or are just plain scared to instruct a lawyer.

Is there any reason why everything now needs to be so complex?

Postscript:

Kerry Underwood is the principal at Underwoods Solicitors and Elish McKee is his trainee. She acted as advocate for the claimant in *Cheryl Weale*