

Abbreviations:

SGP = Standard grievance procedure

MGP = Modified grievance procedure

Overview: How do the statutory provisions on grievance procedures work?

1. Section 32 Employment Act 2002 (“the 2002 Act”) applies to all jurisdictions listed in Sch 4 to that Act¹.
2. An employee shall not present a complaint to an employment tribunal under a jurisdiction to which s.32 applies if **(a)** it concerns a matter in relation to which the requirement in para. 6 (the SGP) or para. 9 of Sch 2 (the MGP) applies, and **(b)** the requirement has not been complied with².

3. Para. 6 of Sch 2 provides that:

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

4. Para. 9 of Sch 2 provides that:

“The employee must-
(a) set out in writing
(i) the grievance, and
(ii) the basis for it, and
(b) send the statement or a copy of it to the employer.”

5. “Grievance” is defined in reg.2(1) of the 2004 Regulations as “a complaint by an employee about action which his employer has taken or contemplates taking in relation to him”. The grievance procedures apply,

¹ s.32(1) EA 2002

² s.32(2) EA 2002

subject to certain exceptions, to “any grievance about action by the employer which could form the basis of a complaint by an employee to an employment tribunal under a jurisdiction listed in” Schs. 3 or 4³ or could do so if such action took place.

Claims based on dismissal of the employee

6. By reg 6(5) “neither of the grievance procedures applies where the grievance is that the employer has dismissed or is contemplating dismissing the employee”. Significantly, “dismissed” is defined in reg 2(1) as having the meaning given in ss.95(1)(a) and (b) of the 1996 Act. Therefore constructive dismissal pursuant to s.95(1)(c) does not count as dismissal and the grievance procedures apply to it.
7. The exclusion of ‘dismissal’ from the categories of case where a grievance must be raised means that a grievance is not needed in any non-constructive dismissal, including those which do not fall within the ambit of s.98, such as:
 - Cases of automatically unfair dismissal such as under s.103A ERA (public interest disclosure), s.99 ERA (pregnancy/family related)
 - Dismissal on grounds which are discriminatory
8. Such claims generally involve the consideration of a factual background prior to the dismissal as well as careful consideration of the employer’s motives. Nevertheless, if the complaint is one of dismissal, as opposed to one of detriment prior to the dismissal itself, there will be no need to raise a grievance. This seems to follow from the statutory wording, above (“grievance is *that the employer has dismissed*”⁴ / grievance procedure

³ r.6(1) 2004 Regulations

⁴ r 6(5) 2004 Regulations

applies to “any grievance *about action by the employer* which could form the basis of a complaint”⁵) – the complaint is not about the reasons or motive for the dismissal, but about the dismissal itself.

9. Mixed claims involving dismissal and claims based on other acts which are separate in time from the dismissal will require grievances to be raised in respect of some parts of the claim but not others. These can create problems with time limits, discussed below.

Under what circumstances is it not practicable to comply with the procedure?

10. Various provisions of the 2004 Regulations provide either for the removal of the requirement for a grievance or deemed compliance by either party, in circumstances where it is not “practicable” or “reasonably practicable” to comply with or to complete the procedure. These are:
 - reg 6(4) employment ceases without procedure being commenced;
 - reg 8(1) employment ceases after step 1 grievance has been submitted;
 - reg 11(3)(c) “it is not practicable for the party to commence the procedure or comply with the subsequent requirement within a reasonable period.”
11. It remains unclear where an employment tribunal will set the threshold for ‘reasonable practicability’. If they apply principles relating to time limits in unfair dismissal cases it will be a “reasonable feasibility”⁶ test, which is an extremely high hurdle. On the other hand, there are now many dicta to the effect that the procedures should not be construed in a manner which

⁵ r 6(1) 2004 Regulations

⁶ per **Palmer v Southend BC [1984] ICR 372**

prevents access to justice and creates technical bars to claims⁷. This suggests the tribunals may take a more relaxed approach.

12. One important question is whether the circumstances of the litigation, as opposed to physical impossibility, can ever be relied upon in these circumstances.

Extension of Time Limits

13. By Regulation 15 of the 2004 Regulations:

(1) *Where a complaint is presented to an employment tribunal under a jurisdiction listed in Schedule 3 or 4 and-...*

(b) *either of the grievance procedures is the applicable statutory procedure and the circumstances specified in paragraph (3) apply;*

the normal time limit for presenting a complaint is extended for a period of three months beginning with the day after the day on which it would otherwise have expired.

....

(3) *The circumstances referred to in paragraph 1(b) are that the employee presents a complaint to the tribunal-*

(a) *within the normal time limit for presenting a complaint but in circumstances in which section 32(2) or (3) of the 2002 Act does not permit him to do so; or*

(b) *after the expiry of the normal time limit for presenting the complaint, having complied with paragraph 6 or 9 of schedule 2 in relation to his grievance within that normal time limit.*

14. In summary, if within the normal time limit an employee either raises a grievance or brings a claim having failed to raise a grievance where one is required, the time limitation period for bringing the claim is extended by 3 months. **NB** in the latter case (claim raised in time but no grievance) the employee has only one month beyond the end of the original limitation

⁷ see for example **Grimmer v City Hopper [2005] IRLR 596 ; City of Bradford Metropolitan DC v Pratt [2007] UKEAT 0391/06/0901**

period in which to submit the grievance, in default of which the tribunal has no jurisdiction to entertain the claim⁸.

Deemed compliance cases

15. The 2004 Regulations contain a number of exceptions to the requirement to commence and/or complete a grievance procedure in a Schedule 3 or 4 case, before a complaint is lodged. These are contained in Regulations 6 to 11, inclusive. In some cases these provide that neither grievance procedure applies in certain exceptional circumstances. In others, they provide for “deemed compliance”. The essential point to note is that the event of exceptional circumstances leading to deemed completion of the procedure, the limitation period will be extended. Where the exceptional circumstances mean the procedures do not apply, the limitation period is not extended.

16. For example, an employee has a claim which would normally require a grievance to be raised but s/he does not raise a grievance, because one of the exceptional circumstances applies (for example, s/he has been subjected to harassment and believes raising a grievance would lead to further harassment). It will not be possible to take advantage of the extension of time limits under r.15.

Colbourne and Barua

17. The linked cases of *HM Prison Service v Barua* UKEAT/0387/06; *Lewisham v Colbourne* UKEAT/0339/06 ([2007] IRLR 4; Lawtel 12.12.06⁹) consider the situation where the grievance is raised before the effective date of termination in a constructive dismissal case. The appellants argued that the requirement to raise a grievance “within the normal time limit” in reg 15(3)(b) meant after the beginning but before the end of the time limit, and hence after the EDT in a constructive dismissal case. As

⁸ the effect of s.32(4) EA 2002

⁹ both cases are reviewed at IDS Brief, vol 819, December 2006

such, it was argued that a grievance raised before the employee resigned could not be relied upon for the purposes of extending the time limit under regulation 15. The EAT held that the proper meaning of “within” was simply “before the end of” the period, and hence a grievance lodged prior to the EDT could be relied on for the purposes of extending the time limit, and the applicable limitation period was 6 months.

18. In *Lewisham v Colbourne*, there was a further complication in that the employee had sent two letters capable of constituting a grievance for the purposes of his constructive dismissal claim. The first was sent 20 days before his resignation and the second was submitted at the meeting in which he resigned. The appellants (LB Lewisham) argued that the employee could only comply with the requirement to raise a grievance once in relation to the same claim. Hence the second letter, which was sent on the EDT, could not be relied on, even though it was sent on the day the three month time limit began to run. Underhill J accepted the appellant’s argument on this point.

19. This seems to suggest that if the employee writes two or more letters in respect of the same basic complaint, only the first one would count as a “grievance”. This raises various issues, particularly as in a constructive dismissal case, a grievance lodged months prior to the EDT may comply with the statutory procedures¹⁰, even if the repudiatory breach is partly based on actions which post date the grievance¹¹.

¹⁰ **Commotion Ltd v Rutty [2006] IRLR 17**: grievance raised two months before resignation; request for flexible working under s. 80F ERA 1996 found to be statutory grievance in case where employer’s conduct subsequent to the grievance being raised (failure to comply with request causing bad atmosphere) was relied on as contributing to constructive dismissal;

¹¹ **Martin v Class Security UKEAT/0188/06/DM**: there was sufficient compliance with para 6 of sch. 2 to the 2002 Act where a grievance letter referred to a specific alleged incident of bullying, but the subsequent claim for constructive dismissal included further alleged repudiatory conduct of a different nature.

The definition of a “grievance”

20. To satisfy s.32(2) of the 2002 Act the “substance of the complaint” later made to the tribunal must be raised in the grievance (*Galaxy Showers v Wilson* [2006] IRLR 83, EAT¹²). There is no requirement for excessive technicality as to the form a grievance takes (*Shergold v Fieldway Medical Centre* [2006] IRLR 76 EAT¹³). “The grievance in question must relate to the subsequent claim, and the claim to the grievance, if the relevant statutory procedure is to be complied with.” However, the wording of the two need not be “anywhere near identical”.¹⁴

Without prejudice letters

21. In *Arnold Clark Automobiles v Stewart* UKEAT/0052/05/RN the EAT confirmed that a without prejudice letter can amount to a grievance. The case involved a long and detailed “without prejudice” letter sent by the Claimant’s solicitor, shortly after the Claimant’s resignation, setting out various heads of claim and making a specific financial proposal for settlement. The letter stated that in the event the proposal was not accepted within 14 days, proceedings would be issued. The Respondent argued that a letter which was adversarial rather than conciliatory could not be properly construed as a grievance within the statutory scheme because it was not genuinely aimed at resolving complaints prior to the issue of proceedings. The EAT rejected this argument and focussed on the statutory language which only required a complaint about action taken by the employer¹⁵.
22. As to the fact the letter was stated to be “without prejudice”, the Respondent argued that it could not be said the Claimant was intimating a

¹² para 17 per Langstaff J

¹³ para 28 Burton P

¹⁴ **Shergold** para 35-36

¹⁵ definition of grievance in reg 2, 2004 Regulations

statement of grievance if at the same time he was reserving his right to say something different at a later date. The EAT decided the letter fell within the statutory definition and emphasised that the claim in the ET1 was in the same terms as the claim in the letter. They said it would have been a different matter if the eventual claim was different in substance.

23. The without prejudice rule prevents admissibility of evidence of any discussions between the parties genuinely aimed at resolving the dispute, whether or not they have the without prejudice label and whether or not admissions are made with a view to settlement. However, the rule has never been absolute and resort may be made to without prejudice material for a number of reasons¹⁶. However, as such documents are inadmissible, if a without prejudice letter is to be relied on as a grievance, it will probably not be possible to deal with the issue of whether the procedures have been complied with at the final hearing in the tribunal. For a without prejudice letter to be adduced at all, both parties would have to agree to waive privilege¹⁷.

ET1 as a grievance

24. Can an ET1 amount to a grievance? The requirement under the SGP¹⁸ is to set out the grievance in writing and send a copy to the employer.
25. On the one hand, the definition of a grievance is extremely broad and would include a letter from a third party, a letter before action¹⁹ and a formal document served by the employee, such as a request for flexible working²⁰. It is also established that a letter which is adversarial in nature,

¹⁶ viz “where the justice of the case requires it, always giving due weight to the purpose of the rule”:

Rush Tomkins v GLC [1989] AC 1280 at 1300

¹⁷ the general rule is that whilst privilege can be waived unilaterally, without prejudice privilege is effectively joint: **Somatra v Sinclair Roche Temperley [2000] 2 L Rep 311**; not reversed by CA on this point

¹⁸ EA 2002 Sch 2 par 6

¹⁹ **Mark Warner v Aspland [2006] IRLR 87**

²⁰ **Commotion Ltd v Ruddy** (supra)

as opposed to genuinely seeking the resolution of a grievance, can nevertheless amount to a grievance under the procedures²¹. On the other hand, allowing the ET1 to stand as a grievance may run counter to the policy of the legislation, which is to encourage employees to raise grievances before resorting to proceedings. It seems very likely that a copy of the ET1 sent to the employer by the Claimant or her representatives would amount to a Step 1 grievance; it should not be assumed that an ET1 served on the Respondent by the tribunal will be viewed in this way.

Problems created by multiple claims

26. In a claim involving different causes of action (typically an unfair dismissal claim accompanied by a discrimination claim) a grievance may be required in relation to certain claims but not others. Given the requirement to wait 28 days after lodging a grievance before lodging the claim, this might mean the limitation date for the unfair dismissal claim has passed before it is possible to file an ET1 in relation to subsequent claims.
27. Typically, this is dealt with by filing two ET1s, but this is not strictly necessary as it is possible to apply to amend an existing ET1, and for the amendment to be treated as a presentation of a new claim. This follows from the case of *Prakash v Wolverhampton CC* UKEAT/0140/06/MAA which held that an ET has jurisdiction to exercise its discretion to allow a claim which was presented prematurely to be amended, so as to permit a claim to be included that could not have been included when the claim form was originally presented, because the claim had accrued at a later

²¹ **Arnold Clark Automobiles v Stewart**

date. It was held that a claim may be “presented” pursuant to s.111(2) ERA²² by way of amendment to an existing claim.

28. In practice, Claimant representatives often have to deal with the situation where a claim has been lodged without presenting a grievance first, which is therefore ‘bad’. Often, however,
- it is already too late to remedy this by lodging a grievance, OR
 - it is already too late to lodge a grievance and send a further ET1 in time.

In these circumstances, it may be worth trying to argue that the original ET1 was a grievance in relation to the relevant claim and then making an application to amend the existing ET1 for the purposes of representing the claim, in the manner permitted by *Prakash*²³. It would still be necessary to argue that it was just and equitable to extend the limitation period in relation to the original claim and to refer to the general principles for amendment in *Selkent v Moore*²⁴. It is unlikely to be worth pursuing this argument in a constructive dismissal claim where the reasonable practicability test will apply to the extension of time.

The requirements of the modified as opposed to the standard grievance procedure

29. The modified procedure applies only if²⁵:
- employment has ceased;

²² “tribunal shall not consider a complaint ... unless it is *presented* to the tribunal ... before the end of three months...” [emphasis added]; the jurisdictional provisions of other statutes (SDA/ RRA etc) are in the same terms

²³ a tactic suggested by C. Camp: “Is this the end of s.32” ELA Briefing Vol 13 No 9 Nov 2006

²⁴ [1996] ICR 836

²⁵ Reg 6 2004 Regulations

- the employer was unaware of the grievance before employment ceased or was aware but the standard grievance was not commenced or completed before the last day of employment; and
 - the parties have agreed in writing in relation to the grievance after the employer became aware of the grievance that the modified procedures should apply.
30. Step 1 of the SGP requires the employee to “set out the grievance in writing” at the first stage. Step 1 of the MGP requires him to set out in writing “the grievance” and “the basis for it”. It is not immediately clear what the difference is.
31. The requirements under the SGP are “minimal in terms of what is required. It is simply that the grievance must be set out in writing”²⁶. The “objective of the statute can fairly be met if the employers, on a fair reading of the statement and having regard to the particular context in which it is made, can be expected to appreciate that the relevant complaint is being raised”²⁷. However:
- "The contrast between the standard and the modified procedure highlights an important feature of the way in which the complaint must be made under the former. As we have noted, there is no obligation to set out the basis of the claim. It is enough, therefore, that the employee identifies the complaint. The need to substantiate that with some evidence to justify it arises under the standard procedure at the second stage where the employee has to inform the employer what is the basis of the grievance." Canary Wharf (paragraph 21)*
32. In *City of Bradford Metropolitan DC v Pratt* [2007] UKEAT 0391/06/0901, the parties agreed to use the MGP. The Claimant’s grievance letter dated 15 July 2005 simply identified an equal pay complaint without identifying the category of comparator (“male employees... for which work is broadly

²⁶ **Shergold** par 30

²⁷ **Canary Wharf** para

similar”) and the nature of the disparity in pay. The Respondent sent a letter requesting details. The Claimant responded with a detailed letter but the particulars it gave were significantly different from the eventual ET1. The issue was whether the 15 July letter satisfied step 1 of the MGP

33. HHJ Richardson held that the requirement in the MGP that the employee set out in writing "the grievance **and the basis for it**" meant that a grievance letter which simply identified an equal pay complaint (without identifying the comparator or the nature of the disparity) did not comply with the MGP, notwithstanding it would have complied with the SGP. He emphasised that the essence of the MGP was that it would not require a meeting and hence it must set out "the essential reasons why he holds his grievance in sufficient detail to enable the employer to respond". The amount of detail would depend on the nature of the grievance:

"...if for example the grievance relates to discriminatory harassment or bullying. Then the employee, who (it must be remembered) has opted for or at least agreed to the MGP, will be expected to set out his account in reasonable detail, not necessarily mentioning every detail but certainly informing the employer of the important matters which the employer should investigate and consider. There will be other grievances where, in the nature of things, an employee may not have full access to the facts, but has formed a grievance based on a suspicion or set of suspicions that certain facts exist. Then it will suffice that the written statement identifies not only his grievance but, in reasonable detail, why he holds the suspicions he does. Detailed evidence (in the sense of the prepared statements which would be appropriate for a Tribunal hearing) is not required"²⁸.

34. It should be noted that the Respondent had mis-stated to the Claimant in writing the requirement of the MGP in that they had failed to tell him that he needed to set out the basis for the grievance. Further the Respondent had not raised the issue about failure to comply at the time. HHJ

²⁸ **City of Bradford Metropolitan DC v Pratt** para 44

Richardson stated he reached his conclusion "with no great satisfaction", as it meant the Claimant was barred from access to the tribunal on a technicality. A factor which he considered important was that the employee had consented to the use of the MGP (as is necessary, for the modified procedure to apply). One consequence of this decision is that a grievance for the purposes of the MGP is likely to require more detail than is required for an ET1²⁹.

Types of claim missing from Schedule 3 or Schedule 4

35. Claims of discrimination on grounds of part time work or fixed term work do not appear in either schedule. As a result the grievance procedures do not apply to such claims.
36. The position is more complicated for breach of contract claims. s.32 (the provision that a tribunal cannot consider a claim where a grievance should have been presented but has not been³⁰) applies only to the jurisdictions set out in Schedule 4 to the EA 2002. By r6(1) 2004 regs, the grievance procedures apply to "any grievance about action by the employer which could form the basis of a complaint to the employment tribunal under a jurisdiction listed in" Schedule 3 or Schedule 4.
37. The jurisdiction for claims for breach of contract³¹ appears in Sch 3 but not in Sch 4. As a result, although an employee is required under the regulations to raise a grievance before bringing a breach of contract claim, an employee who fails to do so will not be prevented from bringing a claim by s.32. However, in the event that employee wins the claim, the award would be liable to be reduced by between 10 and 50% on the grounds of failure to complete the statutory procedure before proceedings were

²⁹ see **Grimmer v City Hopper [2005] IRLR 596**

³⁰ s.32(2)

³¹ The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623)

issued. This is because the adjustment of award provisions under s.31(2) apply specifically to proceedings in relation to a matter listed under Sch.3, if:

*“(a) the claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies....and
(c) the non completion of the statutory procedure was wholly or mainly attributable to failure by the employee-
(i) to comply with a requirement of the procedure.”*

Is section 32 a total jurisdictional bar?

38. The failure to raise a grievance where one is required might not be an absolute bar to a claim in all circumstances. Subsections 32(2) and 32(4) EA 2002 state that “[a]n employee shall not present a complaint to an employment tribunal” if an appropriate grievance has not been submitted or has not been submitted in time.
39. Subsection 32(6) provides a curious exception to this jurisdictional bar. The tribunal shall be prevented from considering a complaint in breach of these provisions **“but only if_**
- 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**
 - the tribunal is satisfied of the breach **as a result of his employer raising the issue of compliance with those provisions in accordance with [the] ... employment tribunal procedure regulations”**.
40. The breach is often not apparent from the information on the face of the ET1. An application for an order under the 2004 Procedure Regulations must be made not less than 10 days before the date of the hearing unless

it is not reasonably practicable, or the chairman allows shorter notice in the interests of justice. Various formalities are required for such an order. It is arguable that if the employer does not properly raise the matter via an application, the failure to raise a grievance will not mean the claim is barred.

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