

# STATUTORY PROCEDURES

## AN OVERVIEW OF THE LEGISLATION AND THE CASE LAW TO DATE<sup>1</sup>

### Source material

#### 1. Required reading

##### 1.1 The Act

Employment Act 2002

Part 3 Dispute Resolution Etc..., under “Statutory procedures”,

Sections **29 to 34**

Schedules **2, 3 & 4**

##### 1.2 The Regulations

Employment Act 2002 (Dispute Resolution) Regulations 2004  
(SI 2004/752)

##### 1.3 Codes of practice, guides etc

ACAS Code of Practice 1: Disciplinary & grievance procedures  
(2004)

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<sup>1</sup>This handout is by way of overview only – some provisions are not dealt with, some not dealt with in their entirety, and most provisions are paraphrased. The reader should resort to the original text rather than relying upon this handout.

## **Synopsis of some important provisions & case law to date**

### 2. The Employment Act 2002, Part 3, s.29-34

- s.29 Gives effect to Schedule 2 (the procedures) & confers power upon the SoS to amend Schedule 2, and to extend the procedures to non employees/employers etc... by deeming them employer/employee for the purpose of the Schedule.
- s.30 Provides for the statutory implication, into 'every contract of employment', of an obligation to comply with the procedures. No-contracting out provision, but does not abrogate obligation to comply with any procedures which go further and are already part of the contract of employment. Confers power on SoS to make regulations about application of the procedures. This section not yet in force.

- ***Scott-Davies v. Redgate [20]***

- s.31 Provides for the consequences of non-completion of procedures viz adjustment of awards – applies to Schedule 3 jurisdictions, 10-50% reduction or increase (saving for exceptional circumstances making it unjust or inequitable) depending upon where fault lies. Confers power on SoS to make regulations about various matters.
- s.32 Restricts, in certain cases, submission of ET1 (i.e. where a grievance procedure applies, Step 1 has not been taken, +28 days etc...). Applies to Schedule 4 jurisdictions.
- s.33 Provides for SoS to make regulations relating to time limits for claims in respect of which statutory procedure applies (note, drafted widely and (on

a plain meaning interpretation) would not confine SoS to making regulations altering time limits merely in connection with the operation of the procedures; in this context note that time limits are generally fixed by primary legislation, e.g. unfair dismissal, s.111(2) 1996 Act).

s.34 Introduces s.98A, and makes amendments relating to remedies. There are some unresolved issues as to the proper interpretation of s.98A(2).

- ***Silman v. ICTS [13]***
- ***Mason v. Governing Body Ward End School [15]***
- ***Alexander & Hatherley v Bridgen Enterprises [16]***
- ***A to B Travel v. Kennedy [24]***
- ***Kelly-Madden v. Manor Surgery [26]***

#### Sched 2 – Statutory Dispute Resolution Procedures

##### Dismissal & Disciplinary Procedures (standard & modified)

- ***Alexander & Hatherley v Bridgen Enterprises [16]***
- ***Masterfoods v. Wilson [19]***
- ***Draper v. Mears Ltd. [22]***
- ***YMCA v Stewart [30]***

##### Grievance Procedures (standard & modified)

- ***Commotion v. Ratty [1]***
- ***Thorpe & Soleil Investments v. Poat & Lake [2]***
- ***Shergold v Fieldway Medical Centre [4]***
- ***Mark Warner v. Aspland [5]***
- ***Arnold Clark Automobiles v Stewart & Anor [6]***
- ***Canary Wharf Management v. Edebi [11]***

- ***Martin v. Class Security Installations Ltd. [14]***
- ***Lipscombe v. Forestry Commission [23]***
- ***City of Bradford v. Pratt [32]***

Generally

- ***Alexander & Hatherley v Bridgen Enterprises [16]***
- ***Khan & King v. Home Office [29]***
- ***Abbey National PLC v. Fairbrother [33]***

Sched 3 – Jurisdictions to which s.31 (adjustment of awards for non-completion of a statutory procedure) applies

Sched 4 – Jurisdictions to which s.32 applies (restrictions on presenting complaints if Step 1 of grievance procedure has not been followed)

### 3. The Employment Act (Dispute Resolution) Regs. 2004

Reg. 2 Interpretation – defines various matters, e.g.

*'Action'* includes omission

*'Dismissed'* defined so as *not to include* constructive dismissal (hence 6(5) does not apply to constructive dismissal and a grievance is necessary)

*'Relevant disciplinary action'* – action short of dismissal which employer asserts to be based wholly or mainly on the employee's conduct or capability other than suspension on full pay or the issuing of warnings (oral or written)

- ***A to B Travel v. Kennedy [24]***

***(Re: the dismissal & disciplinary procedures)***

Reg. 3 Application of dismissal and disciplinary procedures

Note application of standard procedure when employer contemplates dismissing or taking relevant disciplinary action against an employee. What are the implications, in any, if considered in the light of ***Madhewoo v. NHS*** (contemplation of dismissal is subjective and does not involve any concept of communication to the employee) and ***Khan & King v. Home Office***

(3 months an unreasonable delay in dealing with the procedures)?  
But note also reg. 11(3)(c).

Reg. 4 Dismissals to which the dismissal and disciplinary procedures do not apply

Various relatively infrequently encountered scenarios, involving amongst other things industrial action, but note 1(f): “the reason (or, if more than one the principal reason) for the dismissal is that the employee could not continue to work *in the position which he held* without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment”

[emphasis added]

Scope for interesting arguments?

Reg. 5 Circumstances in which parties are treated as complying with the dismissal and disciplinary procedures

***(Re: the grievance procedures)***

Reg. 6 Application of the grievance procedures

Note 6(5):- grievance procedures do not apply where grievance is has been dismissed or employer contemplating dismissal (not applicable to constructive dismissal for reasons above)

- ***Anderson v. George S Hall Ltd. [12]***
- ***LB Lambeth v. Corlett [25]***

Note 6(6):- procedures do not apply where grievance is taking or contemplating taking relevant disciplinary action (unless alleged to be discriminatory, or basis alleged by employer is not the real reason for action)

Regs. 7-10 Circumstances in which parties are treated as complying with the grievance procedures

***(Miscellaneous)***

Reg. 11 General circumstances in which the statutory procedures do not apply or are treated as being complied with.

Various, but note 11(3):-

(a) compliance would result in significant threat to himself, someone else, his property or someone else's property

(b) result in harassment

- ***Lipscombe v. Forestry Commission [23]***

(c) not practicable to commence or comply within a reasonable period

Reg. 12 Failure to comply with the statutory procedures

Note: a breach of the general requirements (which appear at paragraphs 11 to 13 of Schedule 2) by a party has the consequence that that the party is responsible for non-completion

(note that these general requirements include that there should be no unreasonable delay, the time & place of meetings must be reasonable, & conduct of meetings must be in such a way as to allow the parties to explain their cases – fertile ground for employees in particular given the prize of automatic unfair dismissal?)

Reg. 13 Failure to attend a meeting

Note: will be particularly relevant to cases involving long term sickness

Reg. 14 Questions to obtain information not to constitute statement of grievance

Questions under the various discrimination questionnaire procedures.

- ***Holc-Gale v. Makers UK Ltd [8]***

Reg. 16 National security

Reg. 18 Transitional provisions

- ***Madhewoo v. NHS [10]***
- ***Strathclyde Joint Police Board v. McNeil [27]***

***(Time limits)***

Reg. 15 Extension of time limits

- ***Piscitelli v. Zilli Fish Ltd. [7]***
- ***Spillet v. BUPA [9]***
- ***Rainbow International v. Taylor [17]***
- ***Bissett v. Martin [21]***
- ***LB Lambeth v. Corlett [25]***
- ***HM Prison Service v. Barua & Lewisham v. Colbourne [28]***
- ***Codemasters Software Company Limited v. Wong [31]***

## TABLE OF CASE LAW

(All of the following cases appear on the EAT website)

1.	13 Oct 05	Commotion v. Ruddy (EAT) HHJ Burke	<ul style="list-style-type: none"> <li>• A flexible working request was refused, and a claim for constructive dismissal followed. The letter requesting flexible working was upheld as a grievance letter – is this an example of the very wide interpretation given to grievance letters – or an example of misinterpretation?</li> </ul>
2.	18 Oct 05	Thorpe & Soleil Investments v. Poat & Lake (EAT) (Clark, alone)	<ul style="list-style-type: none"> <li>• Whether employee intends to raise grievance in a letter or not is irrelevant</li> <li>• No need to comply with any contractual procedure</li> </ul>
3.	10 Nov 05	Galaxy Showers v. Wilson (EAT) Langstaff	<ul style="list-style-type: none"> <li>• Definition of “Grievance” in Reg.2– EAT observes that action must include inaction (in fact this is clear from definition of ‘action’ in Reg. 2)</li> </ul>
4.	5 Dec 05	Shergold v Fieldway Medical Centre (EAT) Burton	<ul style="list-style-type: none"> <li>• No formality required for grievance letter – requirements minimal</li> <li>• Purpose of procedures is to promote settlement; should rarely be the case that employee barred/employer liable for auto dismissal</li> <li>• Grievance can be in letter of resignation</li> <li>• Unnecessary to make it plain that a grievance is being raised or that a procedure is being invoked</li> <li>• No need to comply with a contractual or company procedure</li> <li>• Not necessary to set out every detail of the complaint – sufficient if employer can “understand the general nature of the complaint”</li> <li>• Unnecessary that employer should have the chance to respond</li> </ul>

5.	8 Dec 05	Mark Warner v. Aspland (EAT) Clark	<ul style="list-style-type: none"> <li>• No matter that letter relied upon as grievance was written by Claimant's solicitor</li> <li>• Can look at a series of letters to see whether, taken as a whole, a grievance has been raised</li> </ul>
6.	20 Dec 05	Arnold Clark Automobiles v Stewart & Anor (EAT, Edinburgh) Smith	<ul style="list-style-type: none"> <li>• Letter before action from a solicitor, which was adversarial and sought compensation, was a grievance</li> <li>• Fact that w/o prejudice did not matter</li> </ul>
7.	21 Dec 05	Piscitelli v. Zilli Fish Ltd. (EAT) Clark	<ul style="list-style-type: none"> <li>• Reg15(2), extension of time, and "reasonable grounds for believing..."; a solicitor's letter before action seeking only a cash settlement could not be interpreted as instigating an internal appeal thereby giving rise to "reasonable grounds for believing..."</li> </ul>
8.	5 Jan 06	Holc-Gale v. Makers UK Ltd (EAT) Clark	<ul style="list-style-type: none"> <li>• The 'first part' of EPA questionnaire cannot be a grievance (see generally reg. 14)</li> <li>• Requirement to first lodge grievance does not breach Equal Pay Directive (although not clear how the claimant's solicitor was seeking to argue this point!)</li> </ul>
9.	22 Feb 06	Spillet v. BUPA (EAT) Clark	<ul style="list-style-type: none"> <li>• The 'normal' time limit in s.32(4) does not mean the 'ordinary' time limit but includes any extension (i.e. because not reasonably practicable/just &amp; equitable)</li> </ul>
10.	1 Mar 06	Madhewoo v. NHS Direct (EAT) Clark	<ul style="list-style-type: none"> <li>• Reg. 18, transitional regulations, involved question of when does an employer first contemplate dismissal? Held that this is subjective and that there is no need for any element of communication to the employee</li> <li>• Investigating officer who would be 'prosecutor' at the disciplinary hearing was 'employer' for purposes of contemplating dismissal</li> </ul>
11.	3 Mar 06	Canary Wharf Management v. Edebi (EAT) Elias	<ul style="list-style-type: none"> <li>• Complaint before the tribunal must be the one raised in the grievance letter</li> <li>• Does the complaint in the letter raise the complaint in the ET1? "[yes] ...if on a true reading of the statement</li> </ul>

			and having regard to the particular context in which it is made, [the employer] can be expected to appreciate that the relevant complaint is being raised”
12.	3 Mar 06	Anderson v. George S Hall Ltd (EAT) Clark	<ul style="list-style-type: none"> <li>Solicitors had thought that in a redundancy dismissal they could extend time by submitting grievance, but failed to notice reg 6(5) which says not applicable where dismissal</li> </ul>
13.	6 Mar 06	Silman v. ICTS (UK) Limited (EAT) Elias	<ul style="list-style-type: none"> <li>Example of s.98A(2) in operation - tribunal found an 80% chance that employee would have been fairly dismissed if employers no breach of the (non-statutory) procedures – and held therefore that the employer was entitled to rely upon s.98A(2). EAT accepted this was the effect of s.98A(2) “on a provisional reading... but we should emphasise that we have heard no argument about the matter”</li> <li>During the course of hearings, further evidence of misconduct emerges, closely related to original alleged misconduct in the Step 1 letter – is a new Step 1 letter required? No, not if just a shift in focus.</li> </ul>
14.	16 Mar 06	Martin v. Class Security Installations Ltd. (EAT, Cardiff) Elias	<ul style="list-style-type: none"> <li>Constructive dismissal. Highlights that Step 1 grievance need only state the complaint and not tied in to any basis given at that stage.</li> </ul>
15.	12 Apr 06	Mason v. Governing Body Ward End school (EAT) McMullen	<ul style="list-style-type: none"> <li>S.98A(2), does not apply to a failure to follow ACAS guidance or good practice (as opposed to procedures whether contractual or not whether written or not) (c.f. Alexander &amp; Hatherley v Bridgen Enterprises)</li> </ul>
16.	12 Apr 06	Alexander & Hatherley v Bridgen Enterprises (EAT) Elias	<ul style="list-style-type: none"> <li>In a redundancy situation the statutory procedures require the employer to give employee detail of (1) reason for redundancy (2) selection criteria (3) his score, but NOT (4) the ‘break point’</li> </ul>

			<ul style="list-style-type: none"> <li>• S.98A(2) cannot be construed to rescue only employers who fail to comply with formal written procedures over and above the statutory minimum</li> <li>• Disciplinary procedure; “basis” for the grounds of the contemplated action does not mean every detail of evidence merely sufficient to enable employee to properly put his side of the story.</li> </ul>
17.	27 June 06	Rainbow International v. Taylor (EAT)	<ul style="list-style-type: none"> <li>• Reg. 15(1) extension is 3 months not 3 months less one day</li> </ul>
18.	31 July 06	Excel Management v. Lumb (EAT) Elias	<ul style="list-style-type: none"> <li>• The tribunal made ‘provisional conclusions’ on SDA claims they could not hear because of s.32. The claimant then presented the same complaints (still in time) after the relevant period had elapsed. Claim came back before the same tribunal who refused to allow the employer to adduce fresh evidence – this was wrong and the employer’s appeal was allowed</li> </ul>
19.	7 Aug 06	Masterfoods v. Wilson (EAT) McMullen	<ul style="list-style-type: none"> <li>• The claimant was not permitted by his employer to appeal because he had not complied with the employers internal policy of providing grounds for the appeal – this was a breach of Step 3 and made the dismissal automatically unfair</li> </ul>
20.	11 Aug 06	Scott-Davies v. Redgate (EAT) McMullen	<ul style="list-style-type: none"> <li>• There is no free standing right to complain of a breach of statutory procedures (unfair dismissal, employee had &lt;1 years service), but note that it was observed that s.30 is not yet in force).</li> </ul>
21.	18 Aug 06	Bissett v. Martin (EAT, Edinburgh) Lady Smith	<ul style="list-style-type: none"> <li>• The extension of time (reg 15) does not operate to extend time for claim against co-employee.</li> </ul>
22.	5 Sept 06	Draper v. Mears Ltd. (EAT) HHJ Burke QC	<ul style="list-style-type: none"> <li>• If words in a Step 1 disciplinary letter are ambiguous, the tribunal is entitled to look at the whole context, including whether employee knew what the</li> </ul>

			<p>allegations against him were</p> <ul style="list-style-type: none"> <li>• Employer complied with Step 1 by writing that the employee had “conduct which fails to reasonably ensure health &amp; safety of oneself and others” (employee caught in company van about to drive after consuming alcohol)</li> </ul>
23.	28 Sept 06	Lipscombe v. Forestry Commission (EAT) McMullen	<ul style="list-style-type: none"> <li>• Claimant’s resignation letter complied with the grievance procedure (unfair constructive dismissal). (Note comment by the ET on the argument advanced before them as to harassment: that claimant was confusing the risk of an unfavourable outcome with that of harassment)</li> </ul>
24.	11 Oct 06	A to B Travel v. Kennedy (EAT) Underhill	<ul style="list-style-type: none"> <li>• S.98A - where, without any statutory procedure, an employee was suspended without pay (that in itself being disciplinary action requiring the procedure), but thereafter a procedure was followed culminating in dismissal, the failure to follow a statutory procedure before suspension did not make the dismissal automatically unfair because the procedure in relation to the dismissal had been completed.</li> </ul>
25.	12 Oct 06	LB Lambeth v. Corlett (EAT) Clark	<ul style="list-style-type: none"> <li>• Summary dismissal; wrongful dismissal complaint (i.e. not given notice period, or pay in lieu) does not require a grievance because reg 6(5) applies</li> <li>• The wrongful dismissal claim fell within 15(2)</li> <li>• Criticises Bisset decision that time not extended in respect of discrimination claims against fellow employees, s.30 not yet in force...still ‘action by the employer’ b/c aiding &amp; abetting within the context of the leg.</li> </ul>
26.	19 Oct 06	Kelly-Madden v. Manor Surgery (EAT) Elias	<ul style="list-style-type: none"> <li>• Re: s.98A(2) EAT followed Alexander v. Bridgen rather than Mason v. Governing Body Ward End school</li> </ul>
27.	6 Nov 06	Strathclyde Joint Police Board v.	<ul style="list-style-type: none"> <li>• Employer contended employees complaint before the tribunal</li> </ul>

		McNeil (EAT, Edinburgh) McMullen	amounted to a complaint of a policy of discrimination continuing post-Oct 04 and so a grievance necessary... claimant simply clarified that she did not rely on acts post-Oct 04
28.	15 Nov 06	HM Prison Service v. Barua & Lewisham v. Colbourne (EAT) Underhill	<ul style="list-style-type: none"> <li>Grievance is lodged 'within normal time limit' even if lodged before EDT or other date from which time starts to run</li> </ul>
29.	17 Nov 06	Khan & King v. Home Office (EAT) McMullen	<ul style="list-style-type: none"> <li>3 months with nothing happening and no explanation was unreasonable delay (EAT compared it with 28 days in s.32 and 3 month time limit)</li> </ul>
30.	6 Dec 06	YMCA v Stewart (EAT) Underhill	<ul style="list-style-type: none"> <li>Letter sent by employer <i>prior</i> to investigatory meeting (rather than disciplinary meeting) effective as a Step 1 letter – the need to look at the whole of an internal process was emphasised - disregarding parties labels (wing member dissented, concerned that pre-investigatory matters might have this effect)</li> </ul>
31.	14 Dec 06	Codemasters Software Company Limited v. Wong (EAT) McMullen	<ul style="list-style-type: none"> <li>Reasonable belief that statutory procedure underway? Claimant invoked an internal procedure 87 days after his dismissal – the internal procedure required lodging within 5 working days! But claimant said he believed that he was following the statutory procedure –based upon his solicitors' advice – and so ET entitled to find that he had a reasonable belief.</li> </ul>
32.	9 Jan 07	City of Bradford v. Pratt (EAT) Richardson	<ul style="list-style-type: none"> <li>The modified grievance procedure requires employee to set out the grievance <i>and</i> the basis for it <i>c.f.</i> the standard procedure under the first step of which employee merely has to set out the grievance. A complaint stating that the employee had an equal act claim was not sufficient for the modified procedure.</li> </ul>
33.	12 Jan 07	Abbey National v. Fairbrother (EAT),	<ul style="list-style-type: none"> <li>An employee resigned claiming constructive dismissal after a rather</li> </ul>

		Smith	insensitive and mishandled grievance. The EAT emphasised the need to ask whether an employer's conduct of a grievance procedure is within the band of reasonable responses to the grievance presented by the employee – because only if is outside that band can it be said that employer has not got reasonable and proper cause - the absence of which is necessary for there to be a breach of the implied obligation of mutual trust and confidence.
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