Ruth Seddon HR

Dealing with a Grievance

Please ensure you refer to your own grievance procedure throughout and especially in relation to any timescale set down by the procedure. If the grievance involves discrimination or bullying/harassment, then the process may result in disciplinary action so clear process is very important.

Handling a grievance

A grievance is a complaint raised by an employee in relation to their employment. It can cover issues about their treatment, or the behaviour of others, or even issues such as whistleblowing, health and safety or criminal actions. The main reason that grievances must be handled carefully is to avoid as far as possible claims for constructive dismissal and unlawful discrimination. A key issue will be your documenting the various stages along the way as a 'paper trail' can greatly assist in defending employment tribunal claims. Another important factor is following your own grievance procedure as well as complying with the ACAS Code of Practice on Disciplinary and Grievance Procedures. An unreasonable failure by an employer to follow the ACAS Code may result in an increase to compensation to an employee who wins a subsequent employment tribunal claim, of up to 25%. The ACAS Code also puts responsibilities on employees including raising a grievance about problems at work; they must put their complaints in writing and must make every effort to attend a meeting.

If the employee is disabled, you will need to be alert throughout to the potential need to consider reasonable adjustments relevant to this process—for example different meeting arrangements may be needed or the employee given longer to gather relevant material together. Also look out for the employee raising adjustments themselves which you may need to consider.

Although you may need to take steps to investigate the employee's grievance, you will need to keep the employee's grievance confidential as far as possible, particularly if it involves allegations against another employee. To the extent that you need to discuss the matter with the employee's colleagues you should make sure they are told to keep matters confidential.

You will need to keep in mind that you will need someone to handle the grievance and a different person, preferably more senior, to handle any appeal.

One other issue that sometimes occurs is where the employee raises their grievance against the most senior or one of the most senior people in the company. In this case the grievance should be dealt with either by another person at a similar level (for example a statutory director) or by someone external to the Company such as an independent HR Consultant or other professional person. Having someone from outside the company may be difficult if Company policies do not specifically allow it, so care should be taken in these cases.

Right to be accompanied

The employee has the statutory right to be accompanied by a colleague or trade union official/ certified representative at grievance meetings. **This would include the meetings at stages 2 and 5 below**. There is no right to be accompanied by a legal representative.

Some employers allow a wider category of companion e.g., a family member or a friend but you do not have to. A reasonable adjustment for a disabled employee might however be allowing a different companion e.g., a support worker or a family member.

The companion can ask questions and can make points on behalf of the employee, but they cannot answer questions for the employee. If the companion is your employee, they are entitled to a reasonable amount of paid time off to prepare for the meeting and consult with the employee after the meeting, as well as the time for the meeting itself.

If the chosen companion cannot attend the meeting, the employee can ask for another date if the request is reasonable, and the new date is not more than five working days after the original date (or longer if both sides agree).

The companion has statutory protection against adverse treatment because they have accompanied someone.

1. Stage 1—issue identified and informal meeting with employee

On being told that there is a problem, the first stage is for the employee's manager to identify as specifically as possible at an informal meeting what the employee's grievance is, when it arose, who it involves and how serious it is. Thought should also be given at this stage as to where relevant documents may be held. Notes should be kept of this meeting, clearly identifying what the issue is and what any next steps are.

If the problem is the employee's own manager, they may have raised the issue with another manager in which case that other manager will need to deal with the issue and not hand it back to the manager who is the problem.

If the issue is relatively minor it may be able to be resolved at this stage. However, if it involves an allegation of discrimination or bullying/harassment or is more serious for another reason then it is important that it is taken seriously from the outset and it made clear to the employee what formal steps they can take. In some situations, the issue may be so serious that the employer has a duty to act, and this may even override the employee's wishes – for example an act which could be criminal in nature or something which puts the health and safety of employees at risk. In these kinds of cases, the employer's duties under law may take precedence.

Assuming the matter cannot be resolved informally, then the employee should be advised to submit a written grievance in accordance with your grievance procedure. They should be told that it may need to be investigated but that you will maintain confidentiality as far as possible.

It sometimes happens that the employee wants something to be done but does not want the person who is the subject of the grievance to know they have complained. In that case, they should be informed that you will try to preserve confidentiality but cannot guarantee it, and if the issue ever ends up in court, a judge may require them to give evidence. In some cases, their identity may be revealed purely by the circumstances of the incident or complaint. The manager should be careful not to put pressure on the complainant to withdraw the complaint, but simply point out the consequences of the actions to be taken.

It is also important to ask the complainant what they want the employer to do and accommodate that as far as is possible.

2. Stage 2—formal written grievance and grievance meeting (right to be accompanied)

Once the employee has submitted their written grievance, a meeting will need to be arranged with them to discuss it. The employee should be invited to the meeting by letter. The meeting could be with the manager with whom they have already discussed the issue (and most commonly would be) or it may be handed over to another manager who will deal with the steps in the formal process from now on (but excluding any appeal). Whoever deals with it must have the authority to take a decision on the grievance. The manager handling it should be given a copy of your grievance procedure and may wish to find out how any similar grievances have been resolved in the past. There should be a note-taker at the meeting or alternatively the meeting may be recorded with the consent of the parties. The ACAS guidance states that the meeting should ideally be held within five working days of the grievance being raised (but if this is not possible do explain that to the employee and do it at the earliest opportunity). The location of the meeting will need to be somewhere reasonably private.

On occasion, an employee may submit a large volume of detail in story form at this early stage; if possible before inviting to the meeting ask them (verbally) to try to identify, group or summarise the core issues so that they can be investigated fully.

At the meeting the employee should have the opportunity to re-state or clarify what the issue is and how they would like to see it resolved. Do be aware that sometimes the grievance does change during the process, so it is really important to have a clear paper trail of what has changed and why. If an employee withdraws part of the grievance, make sure it is recorded and the employee signs to agree to this.

The employee should be asked for evidence to support the allegation(s) if they have not already presented it. They should also be asked for the names of potential witnesses so that you can speak to them.

A grievance hearing is different to a disciplinary in that the investigation is generally done after the meeting, not before. In most cases the manager will need then to investigate further before coming to a decision so the meeting will need to be adjourned for that reason. Even if the manager already has the necessary information, it is usually preferable except in minor cases for the meeting to be adjourned to give the manager time to make his/her decision. When adjourning the meeting, the employee should be told when they can expect a response and kept informed of any delays in investigations.

If the issue is bullying or harassment, then the employee may want the option to remain at home whilst the matter is investigated (but they cannot be made to stay away from work if they want to attend). Alternatively, you may need to make arrangement to separate the employee from the alleged harasser during the investigation.

3. Stage 3—investigations

If the employee has raised issues which need investigation, you will need to complete these in reasonable time. This may involve taking statements from other employees or looking for relevant documents whether in paper or electronic form. As the employer, you are the most likely to have the relevant documents, but you should ask the employee to be as specific as possible if they are asking you to look for something in particular.

There is no requirement to send letters to employees in advance of interviewing them, but it can help to do so. You should outline the incident or issue to be discussed and inform them it is confidential and must not be discussed with anyone. Any statements are taken from other employees these should be provided to the employee together with copies of any other relevant documents found in the investigation. The grievance meeting may need to be re-convened to discuss these with the employee before a decision is made; this is particularly the case where the evidence uncovered contradicts the employee's account.

Anonymity – sometimes employees ask to give evidence anonymously. This should be respected as far as possible, but do be clear that you cannot guarantee permanent anonymity as it the case ends up in court in some way, their identities may be disclosed. Also, given a limited number of witnesses to incidents, it may be obvious who has given what evidence. Witness statements should still be recorded with the names but then anonymised so there are two versions of the record.

There is no timescale set for a grievance investigation, it should take as long as is necessary to complete thoroughly.

4. Stage 4—decision on the grievance

Once any further investigations are completed and a decision is made on the employee's grievance, they should be told of the outcome in writing (although they can be told in person as well). The letter should set out any steps which are going to be taken to resolve the grievance and when. If no steps are to be taken because the grievance is not upheld, then the reasons why should be given. The letter should inform the employee of their right to appeal the decision if they are not happy with it and how they should do so.

5. Stage 5—appeal hearing (right to be accompanied)

A different manager to the one who has dealt with the grievance so far will need to hear any appeal. The appeal should be heard as soon as reasonably possible (the ACAS Code again says ideally within five working days of the appeal being lodged) and the employee told in writing when and where the appeal meeting will be held, with sufficient time for them to prepare. There should be a note-taker at the appeal meeting and it should be held somewhere private.

At the appeal meeting the manager hearing the appeal should go through the points raised by the employee as to why they are dissatisfied with the decision and give them/their companion the opportunity to add any further points. They should be advised as to when they can expect to hear about the outcome of their appeal.

The meeting should then be adjourned to allow time for a decision to be made on the appeal, which should be communicated in writing (although they can be told in person as well). If the grievance is still not accepted, the reasons why should be explained. If the appeal is upheld the letter should set out the steps which will now be taken to deal with the grievance.

Record keeping

It is important to keep copies of relevant documents to be able to resist any subsequent employment tribunal claim. These documents will have to be disclosed to the employee in any subsequent employment tribunal (or court) claim. Although each situation will depend on its facts as to what documents are produced by the process, the following would be expected (in addition to your grievance procedure):

- notes of the initial informal meeting with the employee
- the employee's written grievance
- letter inviting the employee to a grievance meeting
- notes of the first formal grievance meeting
- any letter explaining the next steps e.g., investigations or expected timescale for decision
- documents generated by any investigation e.g., statements from colleagues or other documents
- letter informing the employee of the decision on their grievance and the right of appeal
- any appeal letter from the employee and any letter inviting them to an appeal hearing
- notes of an appeal meeting
- letter informing the employee of the outcome of the appeal

Grievances on or after resignation

A grievance raised in connection with or actually in a resignation letter creates the possibility of a constructive dismissal claim (or wrongful dismissal if the employee has under two years' service). These should always be investigated, and especially so if they involve allegations of discrimination or bullying/harassment. You should try to ensure you meet with the employee, even if they have already left.

There is no legal obligation to investigate a grievance raised after the employee has left, but it may be wise to do so. For most claims in an Employment Tribunal, an employee has a three months' time limit from the incident of which they are complaining or their resignation (whichever applies) to submit a legal claim. A grievance after resignation may therefore be a prelude to a claim.

Collective grievances

The ACAS code does not apply to any collective grievances, i.e., where several employees raise a grievance together. Unless a specific process is set down in the Employee Handbook or contract, there is more latitude in how it is handled. Generally, unless the grievance is limited to two or three people, it is best to ask them to select one or two representatives for the grievance hearing and allow all the employees reasonable time to convene to discuss it as necessary.

Disciplinary action

Disciplinary action may be taken if the grievance is found to be upheld. The detail and outcome of this should not be communicated to the employee who raised the grievance but must be kept confidential. The evidence gathered in the grievance process may be used for the disciplinary.

If the investigation determines that the grievance was not made in good faith (the employee lied) then disciplinary action may be taken against the employee raising the grievance. However, the evidence must be very strong to make this kind of action appropriate; sometimes people really do believe that they are in the right even when they are wrong and there must be clear deliberate misconduct to justify disciplinary action.

Similarly, when investigating a grievance, you sometimes find evidence of an employee breaching conduct rules unrelated to the grievance. While in that case disciplinary action may seem appropriate, careful consideration must be given to all the circumstances. An employee should not be effectively penalised for making a complaint, and if the complaint they have made relates to discrimination, then taking disciplinary action may amount to victimisation under the Equality Act.

Grievances raised during disciplinary processes

It is not uncommon for employees undergoing disciplinary action to raise grievances. In that case, any overlap between the two may prejudice one or both processes. Depending on the facts, the following may apply:

- if the grievance relates to the actions of a person integral to the disciplinary action (e.g. the manager holding the disciplinary hearing) then another unconnected person should take over the disciplinary process, and consideration should be given as to whether to pause the disciplinary process pending the outcome of the grievance

- if the grievance relates to the actual disciplinary investigation or process itself, the disciplinary must be paused while the grievance is investigated
- if the grievance is unrelated to the disciplinary, then both may proceed in parallel

Care should be taken to document the decision and reasoning behind it.

Grievances and sickness

Sometimes an employee goes sick around the time of raising a grievance. Often in these cases, resolving the grievance is key to getting them back to work so the grievance should be investigated as normal. Adjustments and rescheduling of meetings should be made where necessary. It is also important not to bombard an absent employee with communication but to give them time and space to respond to you.

These cases need individual handling and there are no fixed rules.

Mediation

Mediation is only possible where both parties (a) accept that they have done wrong or acted unwisely and (b) they are willing to compromise. This is rarely the case after a grievance has been raised, as by raising a grievance the employee tends to fix their position and the person against whom the grievance has been raised feels hurt or offended. Professional mediators are best suited to handle this kind of mediation.

Guidance & Letters

Grievances are a significant area of risk for employers, with their potential to lead to employment tribunal claims so do get in touch if a grievance is raised. I can identify the risks, guide you through the process and provide template/adapted letters.

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