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## November 2016 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

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### Dealing with tricky grievance issues

Some issues may work themselves out, but as an employer you need to handle things that may be lurking and respond to direct and indirect reports of problems, rather than leaving them to fester. Employees don't always put issues in writing so resolving problems informally at an early stage is very useful. Where a problem is not resolved informally, seeing through a formal grievance process may not always be the best way forward. Workplace mediation may also be an effective way of dealing with problems such as personality clashes or a dispute between a manager and a team member.

#### **What happens if an employee makes a grievance that turns out to be unfounded?**

An employee may maliciously raise a grievance to cause trouble with another employee or innocently raise a grievance that turns out to be unfounded. Should you discipline in this circumstances? You have to assess their culpability, if the employee is some way to blame then a disciplinary may be an appropriate course of action.

Sometimes an employee only raises a grievance to improve their negotiating position, such as when you are dealing with exit arrangements or if an employee is facing a disciplinary hearing. Some employers will avoid having to go through the grievance process by improving the deal that is on the table. Though still go through the grievance otherwise if the deal falls through then you may be criticised and it strengthens the employers position.

When an employee raises a grievance towards a colleague, your obligations towards both employees can make things tricky. You must investigate the complaint thoroughly even if the person raising the grievance is a 'serial complainer' you must be seen to operate an open and fair process.

The person who brings a grievance will want to know that you have investigated it properly, however, there may be confidentiality issues with disclosing all the facts of the grievance, especially if it brings in other employees or third parties. Though this brings in important questions of fairness, especially if you need to discipline the person complained about, as they will want to see all the evidence about them. Each circumstance is different but be careful if you withhold information if you then discipline that employee. Anonymising statements may be possible if it is a bullying complaint but often the person can still be identified from what they say, so make sure you consider it carefully.

#### **What about if an employee raises a grievance while on sick leave?**

In many cases the grievance stems from the illness or incapacity. Deal with the grievance as best as you can, with the employee's incapacity in mind. The wrong approach could lead to a claim for unfair constructive dismissal. Not addressing the grievance is rarely the right thing to do. Though be sensitive and only press for replies for things that can't wait. Trying to deal with the grievance without the employee's input can lead to problems. You may need to get medical evidence to assist understanding how to progress the grievance.

**Employers:** grievance are time consuming for line managers and senior managers to deal with, but be aware that the approach you take may need to be considered carefully in different circumstances.

**Contact us:** we can assist advising on grievances and disciplinaries and guiding your managers through the process.

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## When Grievances and Disciplinarys coincide

It is relatively common for employees who are being taken through a disciplinary process to raise a grievance to try and derail the process. That is not to say that their complaints are not genuine but often the raising of the grievance is so that the employee can focus the attention away from the disciplinary. You won't know the true situation until you investigate the grievance, but what happens to the disciplinary in the meantime, should you put it on hold?

Putting it on hold is a possibility, but it does come down to the issues involved in each. If the grievance relates to the disciplinary then it often makes sense to deal with them both at the same time, you could hold the grievance meeting first, have a break and then move onto the disciplinary hearing. You should not ignore the grievance raised to just move onto the disciplinary. If the grievance raises new concerns not related to the disciplinary you may need to then put the disciplinary on hold for a few days while the grievance is investigated.

One situation that can catch out an employer, is if a grievance is raised by a former employee. For example, in the letter of resignation the employee raises an allegation of bullying. It depends on what the circumstances are but it may be better to still offer to hold a grievance meeting in these circumstances to avoid a possibility of a later claim. In any case you are better to understand a departing employee's complaint if there is a problem in your business for the future.

**Employers:** don't let a grievance being lodged as part of a disciplinary derail the process just take it one step at a time but don't be tempted to cut short the process.

**Contact us:** we can assist with practical advice on dealing with grievance issues in the workplace or informally concerns.

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## Could a manifestly inappropriate final written warning be relied upon to dismiss?

If a final written warning was found to be manifestly inappropriate, should an employer ignore it when considering further misconduct?

In the recent case of *Bandara v BBC* the Employment Appeals Tribunal (EAT) found that the written warning was inappropriate but that the Employment Tribunal had made a mistake when also finding that the dismissal was fair.

The EAT noted that, in general, earlier decisions by an employer should be regarded as established background that should not be reopened. However, an earlier disciplinary sanction can be reopened if it is 'manifestly inappropriate'.

Where an employee is dismissed for misconduct following a final written warning that is manifestly inappropriate, the courts should not put forward a hypothesis of its own, but should look at the employer's reasoning and see whether or not the decision to dismiss was reasonable in the circumstances, considering the extent to which the employer relied on the final written warning.

If the employer treated the warning as no more than background and in fact dismissed for the new misconduct alleged, then it may be that the dismissal was fair. If, however, the employer attached significant weight to the previous inappropriate warning, such as concluding that the employee was already subject to a final written warning, he or she should be dismissed for any significant further misconduct, the employer's decision may not be reasonable.

**Employers:** This case highlights the need to carefully consider the rationale for issuing warnings as part of a disciplinary, and ensuring that this is accurately set out in the warning letter. It also highlights the need to take disciplinary action in a timely fashion and ensure that the allegations to be considered are properly framed for a warning to be relied upon.

**Contact us:** we can assist with investigations, disciplinary procedures and sanctions.

**For more information or assistance Email:** [enquiries@employmentlawsupport.co.uk](mailto:enquiries@employmentlawsupport.co.uk)

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**Silverstone**  
Business Forum

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