

THIRLWALL INQUIRY

Second Witness Statement of John Bowers KC

I provide this statement in response to a request under Rule 9 of the Inquiry Rules 2006

I, JOHN SIMON BOWERS will say as follows

I am a KC specialising in employment law and also the Principal of Brasenose College, Oxford. The specific questions I was asked by the Inquiry are set out in italics with my answers in roman script.

- A. I have been asked to answer a series of questions about the operation of grievance procedures. Before coming to them individually I will make some general comments which I hope are useful. There is not much law on grievances as opposed to conduct of disciplinaries in employment law. There is no appeal to the courts or tribunals from the outcome of grievances but they do often come up for adjudication in unfair dismissal or discrimination cases. A failure to conduct a grievance procedure properly or timeously could be a factor in a constructive dismissal claim. There is also a particular provision for tribunals to apply an uplift to compensation if a grievance has not been properly dealt with and the tribunal considers it just and equitable to apply an uplift of up to 25% of the compensation awarded (Trade Union and Labour Relations (Consolidation) Act 1992 s207A). Further a worker has the right to be accompanied at a grievance hearing. There is general guidance in the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures issued in 2015.
- B. Generally, one should be careful not to make grievances too legalistic. I emphasise that I am dealing here with individual grievances only and not collective grievances which are often brought by trade unions. I am also I

hope careful to avoid straying into fact finding in this particular set of circumstances under review in the Inquiry.

- C. There is a wide range of grievances ranging from the very simple to the very complex. Some will be one person's word against another, others will be document heavy. Some will be focussed, some very diffuse. Here the grievance was presented in a professional setting rather than on a shop floor. This grievance under review was clearly a serious matter in a serious context but other grievances may be more straightforward and easy to deal with. In some the "facts" may be clear, in others they need to be investigated at some length and this will inevitably make the process more formal. Grievance procedures in the public sector tend in any event to be more formal than elsewhere. Delay is a major issue in the handling of some grievances in the NHS and elsewhere.
- D. These factors may be important in determining the expectation of how a grievance will be handled:
 - a. The relative size of the employer, here the Trust;
 - b. The limited resources of an employer or otherwise;
 - c. there may be a need for speed of adjudication especially where there are a whole series of grievances and counter grievances;
 - d. some grievances may flow over into a harassment or bullying policy and then a decision has to be taken as to how they should be handled. The overlap with disciplinary processes is dealt with below.
- E. Further:
 - a. There may be different approaches in heavily unionised workplaces, where it is expected that those grieved against may come with experienced representation (and sometimes the person bringing the grievance may be too);
 - b. It is important for those investigating and hearing grievances to have full access to appropriate information;
 - c. Evidence should not be used in a technical legal sense;
 - d. The extent to which the hearing panel needs to be active in questioning may depend on the co-operation or otherwise in the investigation stage;
 - e. The grievance hearing should not be seen as a general commission of enquiry but confined to the terms of the grievance itself.
 - f. it is important not to deter people from applying for roles in investigating or hearing grievances; these are usually a break from the "day job" for the particular employer or they may work elsewhere.

- F. These features can be picked out about this particular process in the Trust:
- a. The hearing chair apparently saw the HR representative as to some extent part of the decision making process, which will not always be the case;
 - b. Mediation is a centrepiece of this Trust's policy but perhaps was deployed inappropriately here;
 - c. I have never heard of an investigator speaking to the parents of the person bringing the grievance.

Grievance investigation

From your experience and study of grievance procedures (particularly within the NHS) what is your view about:

1. How, and by whom, the Investigating Officer should be chosen? Should the Investigating Officer have any training on how to conduct an investigation, or any other specific experience?

Ideally the Investigating Officer should be chosen by senior management and should have received training in how to conduct an investigation, as is recommended by ACAS. Training is not however always available and if available may not be taken up. Those from HR may make up for this given that their role to advise the investigator or hearing officer. This will be part of the CIPD training received by most HR officers. Others may merely get a template or pro forma as training material. It would help in the health service if the person generally was from a similar speciality (save where the speciality is of no relevance to the actual subject of the grievance) but that may itself serve to compromise the independence of the process (this is a sensitive balance). It should be recognised that many Trusts are relatively small so that the range of those available and willing to take grievances is correspondingly limited.

2. Whether it is necessary that the Investigating Officer be, and be seen to be, independent of the parties and witnesses?

Yes, but the ideal degree of independence may prove difficult in a small Trust (or any small employer). Sometimes the Investigating Officer will also be the decision maker in the case of straightforward grievances. There is here some doubt about the appropriateness of Dr Green hearing a grievance when there had been interaction between him and Stephen Brearey, in relation to one of the cases.

3. What information is generally provided to the Investigating Officer about the grievance and by whom?

Relevant information is generally provided to the Investigating Officer by HR but it may also come from the person raising the grievance (or their union or other representative). The Investigating Officer will normally be given some background information in addition to the grievance itself especially if they are not familiar with the particular workplace. Typically, the Investigating Officer will seek more information as the investigation gets underway. The aggrieved person should supply evidence, documents and the name of witnesses but they may not be experienced in assessing what is relevant to the grievance.

4. Who decides who is to be interviewed and what questions are to be asked in the course of a grievance investigation?

This will usually be the person investigating or hearing the grievance but possibly this will be done in conjunction with HR. It sometimes happens that a person asked to assist the investigation refuses to do so. Some grievances are unclear and the investigator may need to ask for clarification or amplification of them.

5. Whose responsibility is it to draft the investigation report?

This will usually be the person who is investigating alone. Here there was a review of the report by HR which is not in my view advisable, save possibly for purely factual issues which are beyond dispute and for checking in a light touch manner.

6. Is it typical for an Investigating Officer to have support from an HR specialist?

Yes, in a serious case but that HR support would normally be limited to factual and background issues rather than the HR officer(s) being directly involved in the judgment to be reached. HR would normally act as the note taker(s) at any hearing and might carry out administrative functions in relation to the grievance generally.

7. Is it a requirement of the Investigating Officer that they make findings as part of their report to the Chair of the hearing panel?

Yes, but only in a general way as it is ultimately a matter for the hearing officer or panel to exercise judgment on those facts (and this does depend on the nature of the grievance). In some cases, the investigator will be expected to produce conclusions and recommendations for the hearing officer to determine. The difference between findings and judgment will not be as clear cut as they will be in for example a civil legal case.

In general it may be said that the investigator (where there is a separate hearing)

- a. Is not the prosecutor;
- b. Is not the final decision maker;
- c. Should not expand the parameters of what they are asked to do without reverting to the commissioning source.

If so, should they apply a standard of proof?

This would normally be the civil standard, but most grievances will be heard by persons who are not trained in the law. I have not myself come across a grievance finding that actually turned in the application of the standard of proof but there may be some (especially in the area of sexual harassment).

Conduct of a Grievance Hearing

In your experience of the NHS, what is the role (within the grievance process) of the Chair and any other panel members:

1. Is there an expectation about their seniority and experience within the organisation to consider a grievance?

They should be persons of seniority and experience and good judgment ideally, and may be towards or at the end of their career. For some it may be part of their job role to hear grievances but some may take grievances because they have an interest in personnel matters. In some workplaces there may be a reciprocal arrangement whereby the head of one department X will hear grievances in another department Y with the understanding that the head of one department Y will hear those from department X in order to bring some independence. There will be some people who conduct many grievances such as Ms Wetherley had here.

2. Is there an expectation that the Chair should be independent?

Yes. This is very important although given the small size of the Trust this complete independence may be difficult to achieve (save by inviting in an outsider as happened here).

3. Is there a requirement that those hearing a grievance are and are seen to be independent of the parties and witnesses?

Yes. This is very important but may be difficult to achieve for small employers. In some cases, the organisation will seek outside assistance from a solicitor or barrister to investigate in serious cases. There are also some organisations which provide independent non legal investigators.

4. What are the obligations on the Chair of a grievance panel, as decision-maker?

The Chair

- a. Would normally decide which witnesses should be called and whether further investigations are needed beyond the investigation report (in a case where there is a separate investigation stage);
- b. would normally take the lead in preparing the report.

Here the panel did not receive the papers until a few days before the hearing which is all too common.

5. Should the grievance panel produce a written decision about the issues they have considered, the reasons for their findings and apply a standard of proof?

Yes, but not in a legalistic way. The reasons may be quite short too but this depends on the nature of the grievance. There may be recommendations as to the future. I reiterate what I said about the standard of proof.

6. Is it always appropriate to conduct an oral hearing before a grievance panel make any decisions?

No; some cases could be considered on the papers if they were quite straightforward but normally one would expect an oral hearing.

7. Can the grievance panel obtain further evidence, or should they limit themselves to the evidence provided?

They can perform an investigative function and they may seek further enquiries to be conducted. Many panels will indeed not have had the benefit of a separate investigation at all. Here Ms Wetherley said she just worked with the information given to her in the investigation report.

8. Can the grievance panel receive HR, legal or other specialist advice?

Yes, but this may be limited to the Trust itself (and there are obvious resource implications). This may also serve to slow down the process.

9. Where findings are to be made about the conduct of a person is there a requirement or expectation that the matters in respect of which findings are to be made should be put to the person whose conduct may be the subject of criticism?

Yes, in a general way. It is again however emphasised that the grievance process is in general as informal as possible. There is not a formal notion of “Maxwellisation” as there is in public inquiries whereby those to be criticised must formally receive notice of those likely criticisms and be asked to comment.

10. Where mediation is recommended as an outcome of a grievance process, are there requirements to consider the impact of this upon both persons required to mediate before recommending this?

This would normally happen as each “party” would have to agree to the mediation (a point stressed in page 2 of the CoCH Grievance Procedure) but it is not compulsory as part of the procedure. There are no such “requirements”.

11. Are there ways to ensure that a grievance procedure is fair to all the parties involved in it?

Just the general principles of acting fairly. This will involve asking the parties whom they would wish the investigating officer and/or hearing panel to receive testimony from and a general requirement that even in the absence of a formal

Maxwellisation process those like to be criticised should have the opportunity to put their case.

Grievance outcomes

12. Who is responsible for drafting the grievance outcome?

Usually the chair but this could be with assistance from HR as stated above.

13. Is there a requirement to discuss mediation with the proposed parties prior to recommending or requiring it to be undertaken?

There is no such “requirement” but it would be expected as good practice. Many people involved in a grievance would not know what mediation involves and this should be explained.

General observations on Grievance Procedures

14. In your experience within the NHS, how frequently are grievances raised in response to concerns or allegations that a member of staff represents a risk to patient safety?

Very often; and in relation to misconduct more generally. It is often a defensive manoeuvre. If one grievance breaks out, others may follow within a particular section or department. This phenomenon is not in fact confined to the NHS.

15. If this arises frequently, how in your view can this be addressed?

There is a right to bring a grievance but one hopes the person hearing the grievance would see this as a defensive manoeuvre (and perhaps therefore put less weight on the validity of it depending on the facts of the particular case). It would serve to reduce the validity of the grievance in the minds of most but of course this depends on the circumstances of the case.

16. How might a requirement to consider the safety of patients – particularly children and vulnerable adults – be incorporated within the grievance process?

This could be made explicit in the guidance given to those hearing grievances as in effect an overriding objective. There is a tendency to view the grievance purely in terms of the employment dimension rather than the wider context.

17. Is it common in your experience for nurses or doctors to be threatened with referral to their professional regulators in the course of a grievance process and/or when they have raised patient safety concerns?

This is beyond my experience. I have never heard of such a thing.

JOHN BOWERS KC

27 November 2024