

Reform of the Statutory Dispute Resolution Rules

Just over three years ago on 1st October 2004 the Statutory Dispute Resolution Procedures were introduced in the UK. Their aim was to set procedures to follow when dealing with disciplinary and grievance issues. The new rules brought about substantial changes to the law on unfair dismissal and the admissibility of tribunal claims. They sought to ensure that no major decisions affected an employee's employment without basic procedural steps having first taken place. There was no let out clause for smaller companies.

The intention behind the legislation was in theory to encourage the resolution of workplace disputes internally, reduce the number of claims in the Employment Tribunal and in turn the financial burden on the Government. Throughout the 1990's there was pressure on the Government to do something about the volume of claims being brought before employment tribunals. Research has shown that employers with written procedures were more likely to reach a settlement or have a case against them withdrawn than employers without. Small employers, particularly those without written procedures (those with fewer than 250 employees) account for a disproportionately high share of tribunal claims. Figures have shown that although such businesses employ only 18% of the workforce, they feature in 29% of tribunal cases.

In practice we have seen the dawn of satellite litigation to try and "figure out" quite what the Regulations meant. It was the Government's intention that the reforms would not only become a statutory requirement, but also in time become contractual obligations. This aspect was postponed to see how the new procedures bedded in. The Government was committed to a review of the procedures after two years of implementation.

We consider below what the procedures entail, when they apply, the current position, problems encountered together with reform anticipated by the Employment Simplification Bill announced in July 2007.

When the Procedures Apply

The Statutory Disciplinary and Dismissal Procedures ("DDP") apply whenever the employer contemplates dismissal or taking relevant disciplinary action against an employee. This does not include constructive dismissal in respect of which the Statutory Grievance Procedure ("SGP") applies. Relevant disciplinary action does not include, strangely, warnings or suspension on full pay, although it was anticipated that they would be included and these exceptions are inconsistent.

The statutory procedures only apply to employees under a contract, i.e. those who work or worked under a contract of service or apprenticeship. Where an employer is unsure about the employment status of a worker whom he wishes to dismiss or discipline, the best advice would be to follow the DDP, otherwise a tribunal may subsequently find the individual to have been employed and the employer might find himself liable for automatically unfair dismissal.

There are excepted circumstances in which the statutory DDP will not apply. This includes, by way of example, (not an exhaustive list) where: all the employees of a description or in a category to which the employee belongs are dismissed, provided that the employer offers to re-engage all the employees so dismissed either before or upon termination of their contracts; or the employer's business suddenly ceases to function because of an event unforeseen by the employer; the principle reason for dismissal is that the employee could not continue to work in the position which he or she held without contravention of a duty or restriction imposed by any enactment; or in a collective redundancy situation.

The SGP applies where an employee has raised a "grievance". "Grievance" is defined as a complaint brought by an employee about "an act or omission" which his employer has taken or is contemplating taking in relation to him. This can include, for example, a failure to give a pay rise or failure to promote.

The Regulations introduced a three step procedure applicable to the DDP and SGP. This involves:-

- Step 1: sending a Step 1 letter setting out the basis upon which disciplinary action is proposed;

- Step 2: holding a Step 2 meeting to discuss the Step 1 letter;
- Step 3: right of appeal.

The three step procedure for the SGP mirrors that for the DDP and is as follows:-

- Step 1: employee sets out their grievance in writing and sends it to the employer;
- Step 2: meeting to discuss the grievance;
- Step 3: right of appeal.

The Regulations introduced modified procedures to apply in certain circumstances. In the case of the DDP, the modified procedure entails: step 1 letter and a step 2 appeal (with no meeting). The Regulations provide that the modified procedure applies to a small set of gross misconduct dismissals where there are four elements present:-

- The employer dismissed the employee by reason of his/her conduct without notice;
- The dismissal occurred at the time the employer became aware of the conduct or immediately thereafter;
- The employer was entitled, in the circumstances, to dismiss the employee by reason of his/her conduct without notice or any payment in lieu of notice; and
- It was reasonable for the employer, in the circumstances, to dismiss the employer before enquiring into the circumstances in which the conduct took place.

In reality, it is unlikely that employers would be advised to follow the modified DDP. For example, although an employer may think that they have caught an employee red handed having seen an employee taking money out of the till, after investigation, there may be a perfectly acceptable reason for the conduct, namely that the employee had put money into the till earlier in the day, needing change and was simply taking out the equivalent sum of money. It is likely that employment lawyers may seek to argue by way of a defence that the modified DDP applies but very often with not much of prospect of success.

Similarly there is a modified SGP. This involves:-

- A step 1 letter setting out the grievance and the basis for it, which is sent to the employer; and
- A step 2 response by the employer in writing which is sent to the employee.

The modified GP is the only one of the four statutory procedures which does not include a right of appeal. An employee who is dissatisfied with the employer's response is therefore likely to bring a Tribunal claim.

The modified GP applies only in circumstances where employment has ended and the SGP has not already been completed in relation to the employer's grievance. An ex-employee is fully entitled to follow the standard SGP should he or she choose to do so in respect of a grievance that was not raised prior to the employment ending. However, if he or she does not want to meet with the former employer in compliance with step 2 of that procedure, he or she might seek to agree to the modified GP being followed. In reality, how likely is it that a point of dispute will be resolved without a face to face meeting? Some critics of this statutory procedure would consider it to be highly unlikely and therefore the modified SGP will often serve no purpose.

The Implications of Non-Compliance

The implications of not complying with the procedures have been fairly draconian. In terms of the DDP, a failure to follow the procedure by an employer leads to a finding of automatic unfair dismissal with a potential uplift in compensation awarded of between 10%-50%. On the reverse side, an employee who has failed to raise a grievance and wait 28 days before bringing a claim may find himself barred from pursuing a remedy in the Employment Tribunal. In either case a failure to follow a procedure may result in an uplift in compensation. Compliance with the statutory procedures, however, does not guarantee that a Tribunal will find the dismissal was fair.

Review of The Legislation

After a good deal of disquiet and a considerable volume of additional litigation the Government on 12th December 2006 assigned to Michael Gibbons¹ the task of reviewing the options for simplifying and improving all aspects of employment dispute resolution. Michael Gibbons stated at the outset of his review that he was impressed with the Government's willingness to commission an independent review of the situation, despite the fact that the Dispute Resolution Regulations had been implemented only two years previously. He noted that the Government also had made it clear that it wanted to take on the challenge of adapting the Regulations if it were agreed that they were not working as intended.

Michael Gibbons' headline recommendation was clear. He recommended the complete repeal of the Statutory Dispute Resolution Procedure. He gave complimentary recommendations with a view to deregulating and implementing the system to reduce the complexity of the procedures and to reduce the cost to employees and businesses. He noted that there was an overwhelming consensus that the intention of the 2004 Regulations was sound, that there had been a genuine attempt to keep them simple but near unanimity that as formal legislation, they had failed to produce the desired outcome.

He emphasised that early resolution of issues was key. It is clear that it is commonly believed that the procedures, instead of resolving disputes at an early stage, led to the formalisation of work place issues. Once an employee has raised a complaint in writing the employer is duty bound to ascertain from the employee whether he or she wants the matter dealt with as a grievance pursuant to the grievance procedure. The employer may also feel

¹ Michael Gibbons is a member of the DTI's Ministerial Challenge Panel and of the Better Regulation Commission. He is also Chair of the Hertfordshire Family Mediation Service Limited and until February 2002 was a director of UK Communications at Powergen. He agreed to lead the independent review of employment dispute resolution in a personal capacity.

so obliged when an employee has made a serious oral complaint. Michael Gibbons noted that smaller employers in particular found that the need to put something in writing often exacerbated and formalised a problem rather than resolving it.

In practice early resolution may simply involve an apology being given, changes in behaviour or an agreed job reference.

Michael Gibbons recommended:-

- Repeal of the Statutory Dispute Resolution Procedures;
- Employment Tribunals at their discretion take into account the reasonableness of the parties when making awards and costs orders;
- A new simple process to settle monetary disputes without the need for Tribunal hearings;
- Improve the quality of advice to potential claimants and respondents through an adequately resourced help line and the internet;
- Offer a free early dispute resolution service including where appropriate mediation.
- Production of clear, simple, non-prescriptive guidelines on grievances, disciplinary and dismissal in the workplace for employers and employees;
- Incentives to comply with the new guidelines by giving Employment Tribunals a discretion to take into account the reasonableness of the parties;
- Challenge all employers and employees to commit to implement a policy of early dispute resolution and greater use of in-house mediation, early neutral evaluation and provisions in contracts of employment;
- Abolish the fixed period within which ACAS must conciliate.

Consultation

Following Michael Gibbons' findings the Government, through the DTI, launched a consultation known as a Resolution Resolving Disputes in the Workplace in March 2007.

By consultation the Government sought views on measures to help resolve employment disputes successfully in the workplace. The DTI noted that productivity is raised through improved workplace relations and the need to reduce the cost of resolving disputes for all parties. It noted the need that employment rights are not diluted.

What Problems Have Arisen From The Procedures?

Many of the litigation cases have focused on what amounts to a Step 1 Letter for the purposes of both the DDP and the SGP. There have been a number of cases as to whether an uplift should be applied.

There have been a number of anomalies about the procedures. For example, so far as contract claims are concerned (other than wrongful dismissal), a claim may be brought by an employee without raising a grievance. However there may be a reduction in damages awarded as a result of a failure to grieve.

There have been a number of traps into which the unwary have fallen. For example, there are no exemptions for short service or non-renewal of a fixed term contract within the first year of service. A common question that employees have asked is whether the statutory procedures apply in the first year of service. Generally an employee needs to have one year's service to bring a claim for unfair dismissal (unless the claim for unfair dismissal fits within a certain category of cases in which one year's service is not required, for example, dismissing for a trade union reason). Whilst in this case the employee would not have one year's service to bring a claim for unfair dismissal, if the employee succeeded in another claim such as for breach of contract or discrimination and the employer had failed to follow the correct statutory procedure, the employer would risk there being an uplift in compensation awarded as a result.

In practice the Employment Appeal Tribunal has applied the procedures flexibly and endeavoured to avoid an over-technical approach, in the spirit of applying the overriding objective. The "overriding objective" applied by Employment Judges (previously known as Tribunal Chairman) is that Regulations and Rules will be applied so as to deal with a case justly, in so far as practicable, ensuring that the parties are on an equal footing, dealing with the case in ways which are proportionate to the complexity or importance of the issues, ensuring that the cases are dealt with expeditiously and fairly and saving expense.

Future Reform

We await the outcome of the DTI's consultation process. The Employment Simplification Process anticipates the repeal of the procedures and the implementation of recommendations made by Gibbons intended to ensure early resolution of workplace issues. However there may not be reform until 2009. In the meantime take note of those traps for the unwary!

Some examples to show how the procedures work in practice:-

Case Study 1 – an employee is dismissed by his employer. He brings a claim for unlawful deduction of wages in respect of the non payment of holiday pay and a claim for disability discrimination based on the way he was treated during his employment. The Employment Tribunal allows his claim for breach of contract to proceed as he raised this by way of grievance. The Employment Tribunal rejects his claim for disability discrimination as this was never raised by way of grievance.

Case Study 2 – an employer verbally requests a meeting with an employee. At the meeting the employee is advised that he is to be made redundant. After the meeting the employer confirms the decision to make his position redundant and advises him that he has a right of appeal. The employee appeals against the decision some two months later and the employer responds that the appeal has been sent too late and will not be heard. Has the employer breached the DDP? Yes. The employer has failed to send the employee a step 1 letter and failed to give the employee a right of appeal pursuant to step 3. Employers should beware that even though their intention to reject the appeal was simply with a view to complying with their own written disciplinary procedure, they risk a finding of automatic unfair dismissal and a potential uplift in compensation of between 10-50%.

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