

Disciplinary, Dismissal and Grievance – Procedure, what Procedure?

Introduction

1. All present will be aware of the repeal of the statutory dispute resolution procedures introduced in October 2004 by the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/752) with effect from the 6th April 2009 and may well have heaved a sigh of relief.
2. The procedures (which for the purposes of this talk I shall refer to as “the old regime”) have been replaced by what is envisaged to be a more flexible Code (“the new regime”).
3. This talk aims to explore whether the sigh of relief at the passing of the old regime should be issued just yet given the transitional procedures which apply and whether the introduction of the Code is necessarily an improvement on what came before.

Transitional Provisions – Which procedure?

4. Unfortunately, not every claim that is made following the 6th April 2009 will fall under the new regime and the statutory procedures, section 98A and the Dispute regulations (including the time limit extensions) still apply in certain circumstances. It is therefore important to know which regime applies.
5. The Employment Act 2008 (Commencement No. 1, Transitional Provisions and Savings) Order 2008¹ provides the following:

Disciplinary and dismissal

6. The procedures (and section 98A) still apply where on or before the 5th April 2009 they would have applied and on or before that date the employer has:

¹ SI 2008/3232

- (1) complied with the requirements of paragraph 1, 2 or 4 of Schedule 2 of the 2002 Act (Step 1 and 2 of the standard procedure or Step 1 of the Modified procedure although there is no requirement that the employer has informed the employee of their right to appeal);
- (2) taken relevant disciplinary action against the employee; or
- (3) dismissed the employee.²

Grievance

7. The situation in respect of the grievance procedures is more difficult. The grievance procedures (and section 32 of the 2002 Act) applies where the particular grievance procedure would have applied prior to the 6th April 2009 and:

- (1) the action about which the employee complains (by complying with paragraph 6 or 9 of Schedule 2 to the 2002 Act (Step 1 of the standard or modified procedure) or presenting a complaint to an employment tribunal) occurred wholly before 6th April 2009³.
- (2) the action which forms the basis of the grievance begins on or before 5th April 2009 and continues beyond that date and
 - a) the employee presents a complaint to the employment tribunal or complies with paragraph 6 or 9 of Schedule 2 to the 2002 Act in relation to the grievance –
 - i) on or before the 4th July 2009 in respect of claims with a 3 month time limit (listed in Part 2 to the Order) and there is no issue re: industrial action pursuant to section 238 of the TULRCA 1992;
 - ii) on or before the 4th October 2009 for claims with a 3 month time limit where industrial action pursuant to section 238 is an issue;

² Ibid Schedule, article 3 Part 1 paragraph 2(1) and (2)

³ Ibid Schedule, article 3 Part 1 paragraph 3(1)

- iii) on or before 4th October 2009 in respect of claims with a 6 month time limit⁴.
8. The upshot of these provisions is that there may be claims post 6th April 2009 which are still governed by the old regime and claims where part of the claim is governed by the new regime in respect of the disciplinary procedure to be applied but the old regime in respect of the grievance procedure. It should also be noted that there could even be cases which are instituted after the 4th October 2009 to which the old regime continues to apply.
9. Knowing which procedure applies is clearly important when it comes to time limits. A Claimant may have an additional 3 months to make a claim or may find themselves having filed their claim outside the ordinary time limit unless they take care to ensure they know which applies. Equally, employers may still be able to avoid a substantive hearing where a grievance has not been sent by the employee prior to the issue of proceedings where the old regime applies, for example where the grievance is about actions or omissions before the 6th April 2009.

The Old Regime

10. Before considering the changes and benefits/disadvantages of the new regime when compared with the old regime it is important to remember what was required by the old regime and what the consequences of failure were.
11. The statutory procedures were set out within Schedules to the Employment Act 2002 (“the 2002 Act”) and the application of the procedures was governed by the Employment Act 2002 (Dispute Resolution) Regulations 2004⁵ (“the Dispute Regulations”).

Dismissal and Disciplinary Procedures

⁴ Ibid Schedule, article 3 Part 1 paragraph 3(2)

⁵ SI 2004/752

12. Two procedures were set out under Schedule 2 of the 2002 Act, a standard procedure and a modified procedure.

The Standard Procedure

13. The standard procedure applied when an employer contemplated dismissing or taking relevant disciplinary action (action short of dismissal which an employer asserted was based wholly or mainly on the employee's conduct or capability, other than suspension on full pay or the issuing of warnings whether oral or written⁶) against an employee⁷ unless the modified procedure applied or in circumstances where neither procedure applied set out in Regulation 4 of the Dispute Regulations (for example dismissal on the ground of retirement, action by reason of the employee's participation in a strike, the employer's business suddenly ceased to function etc.).

14. The standard procedure envisaged a 3 step process⁸ which in essence was:

- Step 1 setting out in writing the alleged conduct or other circumstances leading to him contemplating dismissing or taking disciplinary action;
- Step 2 Holding a meeting with the employee, before which he must have been provided with the basis for the matters set out at Step 1 and been given a reasonable time to consider his response. It had to be held before action was taken. The employer was required to set out its decision following the meeting and inform the employee of his right to appeal.
- Step 3 If the employee appealed, an appeal meeting had to be held and the employee had to then be informed of the employer's decision.

The Modified Procedure

⁶ Dispute Regulations, regulation 2(1)

⁷ Dispute Regulations, regulation 3(1)

⁸ Employment Act 2002, Schedule 2 paragraphs 1 to 3

15. The 2002 Act also envisaged the following of a procedure where the Claimant was dismissed summarily by reason of his conduct after the dismissal had occurred by inclusion of the modified procedure.

16. The modified procedure applied where:

- a) the employer dismissed the employee by reason of his conduct without notice,
- b) the dismissal occurred at the time the employer became aware of the conduct or immediately thereafter,
- c) the employer was entitled, in the circumstances to dismiss the employee by reason of his conduct without notice or any payment in lieu of notice and
- d) it was reasonable for the employer, in the circumstances, to dismiss the employee before enquiring into the circumstances in which the conduct took place⁹.

17. The modified procedure was a two step procedure¹⁰:

- Step 1 The employer was required to set out the alleged misconduct which led to the dismissal and the basis for thinking at the time of dismissal that the employee was guilty of the alleged misconduct and the employee's right of appeal.
- Step 2 If the employee informed the employer that he wished to appeal, the employer had to invite him to a meeting and after the meeting inform the employee of the outcome.

18. Neither procedure applied if the employee made a complaint to an employment tribunal in respect of a dismissal to which the modified procedure would have

⁹ Dispute regulations, regulation 3(2)

¹⁰ 2002 Act, Schedule 2 paragraphs 4 and 5

applied but the employer had not complied with Step 1 of the modified procedure at the time the complaint was made¹¹.

The Grievance Procedures

19. The 2002 Act also envisaged two separate procedures to deal with employees' grievances, a standard and modified procedure.

20. The grievance procedures applied in relation to any grievance about action by the employer that could form the basis of a complaint by an employee to an employment tribunal under a jurisdiction listed in Schedule 3 or 4 or could do so if the action took place.¹²

The Standard Procedure

21. The standard procedure applied in respect of any grievance as set out above and subject to the modified procedure applying or where:

- (1) the employee ceased to be employed by the employer, neither grievance procedure had been commenced and it was not reasonably practicable for the employee to commence the procedure since he ceased to be employed by the employer.
- (2) the grievance was that the employer was dismissing or contemplating dismissing the employee¹³
- (3) the grievance was that relevant disciplinary action was being taken (unless the reason for the grievance was that the reason for the disciplinary action was or would amount to an unlawful act of discrimination or the grounds on which the disciplinary action was taken or the employer was contemplating taking disciplinary action were unrelated to the grounds on which he asserted he took the action or was contemplating taking it¹⁴.

¹¹ Dispute Regulations, regulation 3(2).

¹² Dispute Regulations, regulation 6(1)

¹³ Dispute regulations, regulation 6(5)

¹⁴ Dispute regulations, regulation 6(6)

- (4) in circumstances where regulation 11(1) applied (for example, if an employee were to start the procedure he had reasonable grounds to believe, having been subjected to harassment, that commencing the procedure would result in further harassment etc).

22. The standard procedure was a 3 step process:

- Step 1 The employee had to set out the grievance in writing and send it to the employer
- Step 2 The employee must be invited to a meeting before which the employee had to set out the basis for the grievance and the employer had a reasonable opportunity to consider it, a meeting should be held and the outcome communicated to the employee in addition to his right to appeal;
- Step 3 If the employee appealed, a hearing should take place and the outcome notified to the employee¹⁵.

The Modified Procedure

23. The modified procedure again applied once the employee had left the employer's employment and where the employer was unaware of the grievance before he ceased to be employed or was aware and the standard procedure was not commenced or completed before the last day of the employees' employment and the parties agreed in writing that the modified procedure should apply.

24. The modified procedure was a two stage process:

- Step 1 The employee had to set out in writing the grievance, the basis for the grievance and send it to the employer;

¹⁵ Employment Act 2002, Schedule 2 paragraphs 6 to 8

Step 2 The employer had to respond in writing and send this to the employee¹⁶.

Further general requirements

25. Part 3 to Schedule 2 to the 2002 Act set out general requirements which applied to all statutory dispute resolution procedures namely:

- a) Each step must be taken without unreasonable delay;
- b) Meetings had to be conducted in a manner to enable the employee and employer to explain their cases;
- c) in respect of appeals, as far as reasonably practicable, the employer should be represented by a more senior manager than attended the first meeting¹⁷.

Regulations 4, 5, 7 and 11 of the Dispute Regulations

26. In addition to the above there were also certain circumstances in which the procedures did not apply or were deemed as having been complied with and set out at regulation 4, 5, 7 and 11 of the Dispute Regulations.

The Consequence of Failure and other facets of the old regime

27. The following were the consequences of a failure to comply with the procedures:

- a) There could be an increase or reduction in compensation paid to an employee of between 10% and 50% depending on whether the employee of employer was to blame for a failure to comply with the statutory procedures and unless the tribunal considered that there were exceptional circumstances which would make such an increase or decrease unjust or inequitable¹⁸.
- b) If an employer failed to comply with the disciplinary and dismissal procedures and dismissed the employee, such a dismissal was automatically unfair¹⁹.

¹⁶ Ibid paragraphs 9 and 10

¹⁷ Employment Act 2002, Schedule 2 paragraphs 11 to 13

¹⁸ Employment Act 2002, section 31

¹⁹ Employment Act 1996, section 98A(1)

- c) If an employee failed to send a grievance to the employer within specified time limit, the tribunal would have no jurisdiction to consider the complaint provided the particular complaint required a grievance to be made²⁰.
- d) In cases where the dismissal procedure was followed but there were other procedural failings which a tribunal considered did not affect the outcome, namely that the employee would have been dismissed in any event, the dismissal would be fair²¹.
- e) In certain circumstances, an employee would have an extension of 3 months to the ordinary time limit in which to make a claim²².

The New Regime

28. The statutory dispute resolution procedures were repealed (subject to transitional provisions, see below) on the 6th April 2009 when Part 1 of the Employment Act 2008 came into force²³.
29. The statutory procedures have been entirely replaced by a revised ACAS Code of Practice entitled “Disciplinary and Grievance Procedures” and published in April 2009 (Appendix A). This Code is supplemented by an ACAS Guide entitled “Discipline and Grievances at Work (2009)”.
30. In order to encourage employers to follow the Code, section 207A was inserted into the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA 1992”) by the Employment Act 2008²⁴. Section 207A provides that where the Code of Practice applies and has not been followed by either an employer or an employee, and the failure to follow the procedure was unreasonable, then the employment tribunal may, if it considers it just and equitable in all the circumstances, increase or reduce any award it makes to the employee by no more than 25%.

²⁰ Employment Act 2002, section 32(4)

²¹ Employment Act 1996, section 98A(2)

²² Dispute Regulations, regulation 15

²³ By reason of the Employment Act 2008 (Commencement No.1 Transitional Provisions and Savings) Order 2008 (SI 2008/3232), section 2.

²⁴ Section 3(1), (2)

31. It should be noted that it is a failure to follow the Code of Practice that may result in an increase or decrease in compensation. A failure to follow the Guide that accompanies the Code does not result in this sanction being applied although it may be taken into account by a tribunal when it considers whether the employer has acted reasonably or not for example in claims for unfair dismissal.

What are the changes?

32. The following is a summary of the changes to the regime following the coming into force of Part 1 of the Employment Act 2008:

- (1) No statutory procedures but a Code of Practice which can result in an increase or decrease in compensation;
- (2) Section 98A of the Employment Act 1996 has been repealed. This has two consequences:
 - a) A dismissal is no longer automatically unfair as a result of a failure to follow the statutory procedure;
 - b) If the failure to follow the procedure would have made no difference to the result, namely that the employee would have been dismissed in any event, the dismissal will not now be fair (as it would have been pursuant to section 98A(2)) but there may be a Polkey reduction in compensation to reflect this.
- (3) Employees no longer have to send a grievance in writing to their employer prior to bringing an employment tribunal claim. Although the failure to do so is likely to result in a decrease in the compensation payable to the employee it no longer precludes an employee from making a claim as it did pursuant to section 32(4) of the 2002 Act.
- (4) The Code does not apply to dismissals due to redundancy or the non-renewal of fixed term contracts on their expiry. It is expressly stated that disciplinary situations include misconduct and/or poor performance.

- (5) There are no extensions to the ordinary time limits (as there were pursuant to Regulation 15 of the Dispute Regulations).
- (6) The term “grievance” has a slightly different definition under the Code. Grievances are *“concerns, problems or complaints that employees raise with their employers²⁵”* as opposed to *“a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him”²⁶*.

33. In addition the Code makes it clear that whenever a disciplinary or grievance process is being followed it is important to deal with the issues fairly. The Code sets out a number of elements to this:

- Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act **consistently**.
- Employers should carry out any necessary **investigations**, to establish the facts of the case.
- Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made,
- Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.
- Employers should allow an employee to **appeal** against any formal decision made²⁷.”

34. There is also a hint within the Foreword to the Code that third party mediation is to be encouraged although this does not find its way into the Code itself. It is however included within the Guide.

²⁵ Code of Practice paragraph 1

²⁶ Dispute Regulations, regulation 2

²⁷ Code of Practice, paragraph 4

Will the new regime make any difference?

35. The aim of the new regime is set out within the Foreword to the Code itself which states *“Employers and employees should always seek to resolve disciplinary and grievance issues in the workplace”*. It is therefore clear that a reduction in the number of claims before employment tribunals is the aim. The question remains, will the Code achieve this aim?

Generally

36. The main benefit of the new regime is its simplification. It is much clearer in respect of when the procedures apply and leaves it to individual tribunals to determine whether there has been compliance and whether there should be an uplift or decrease in compensation in any given case. This avoids the complexity under the Dispute regulations where there were a number of exceptions and situations where the procedures did not apply or were deemed to have been complied with.

To Employers

37. The only significant changes that, in my view, will potentially benefit employers are the repeals of section 98A(1) of the Employment Rights Act 1996 which made any dismissal automatically unfair where there was a failure to follow the statutory procedures and Regulation 15 of the Dispute Regulations which extended the ordinary time limits in certain circumstances.

38. The repeal of section 98A(1) has however caused little problem in practice as other than the payment of a basic award, an employer could avoid a compensatory award if it could show that a fair dismissal would still have occurred had the procedure been followed. The only benefit to an employer is therefore the potential avoidance of paying a basic award. However, it is likely, given that the tribunal will take the Code and Guide into account in determining whether a dismissal is unfair, that a failure to follow the Code will render a dismissal unfair in most cases and employers will be left where they were before, arguing for a Polkey reduction. The perceived benefit may not materialise.

39. The repeal of regulation 15 of the Dispute Regulations is likely to prove more important to employers, at least in the short term. However, again with time, employees are likely to get their act together and ensure that claims are made within the time limits and the benefit of this repeal may again not be as significant as it would first appear.
40. The fact that redundancy dismissals are not required to be in compliance with the Code is also unlikely to make any impact in practice. An employer is still under a duty to consult with the employee before making the decision to dismiss and therefore, in most cases where a finding of unfairness is to be avoided, the employer will have in effect complied with most of the requirements of the Code and/or statutory procedures in any event.
41. Otherwise, in my view, the situation under the new regime makes life more difficult for employers. In some ways the Code is actually more prescriptive than the old regime. There is an explicit requirement that there be necessary investigations of any matter which is additional to providing information to the employee and holding a meeting. This goes further than the requirements of Steps 1 and 2 of the statutory procedures. The Code also suggests what would be appropriate action in given circumstances. It is also likely that some of the case law under the old regime such as in respect of what information an employee should be provided with (for example as considered in *Alexander v Bridgen Enterprises Ltd* (2006) ICR 1277) will continue to be relevant in determining whether there has been compliance with the Code.
42. The above, in my view, allows an employee more easily to suggest that the employer has failed to follow the procedures in the Code, both to achieve an increase in their award but also to allege that the employer has acted unfairly. This is likely to increase the number of claims in my view rather than decrease them.

43. Allied to the above, the repeal of section 32 and the requirement that an employee submit a grievance before bringing a claim is likely to increase the number of claims that a tribunal has to deal with at a final hearing.
44. The repeal of section 32 will stop the litigation that has arisen trying to determine whether a grievance had been made or not (such as in the cases of *Canary Wharf v Edebi* (2006) ICR 719 and *Shergold v Fieldway Medical Centre* (2006) ICR 304) and may therefore reduce the number of Pre-Hearing Reviews that a tribunal has to consider to determine whether it has jurisdiction in respect of the particular complaint. However, complaints which will not have been made because no grievance was submitted within the prescribed time limits will now be made to the tribunal and those which would have been dismissed at an early stage will continue to a full hearing. Making it easier for an employee to make a claim is unlikely to result in a reduction in the number of claims being made.

To Employees

45. The only real downsides that I can see for an employee are that there are no time limit extensions, that there is only the ability to achieve, at best, an increase in compensation of 25% rather than the previous 50% and that a tribunal can take a failure by the employee to comply with the Code into account in determining the fairness of a dismissal and the reasonableness of the employer's actions.
46. As indicated above, these are unlikely to trouble most employees. The fact that there are no extensions to the time limits simplifies matters in my view and most employees will ensure that their claims are made within 3 months as a result. The fact that a tribunal will take an employee's failure to comply with the Code into account is likely to be similar to the approach taken in relation to the statutory procedures where a failure by an employee to engage in a dispute resolution process was not looked upon favourably. The decrease in the maximum uplift on compensation should also be looked at in the context that the maximum reduction in compensation has also reduced to 25% and hence benefits an employee.

47. In my view the new regime provides little disincentive to an employee in respect of their making a claim and in fact makes it easier to do so and potentially achieve an uplift in any compensation awarded.

Conclusion

48. In my view the new regime is unlikely to reduce the number of claims being made to employment tribunals. The Code makes it easier for employees to suggest that employers have not followed the correct procedures and the repeal of section 32 of the 2002 Act makes it easier for an employee to make a claim and/or for that claim to proceed to a full hearing.

49. It seems to me that increasing or decreasing compensation is unlikely to have the desired effect of discouraging an employee from making a claim or encourage an employer to follow the Code. It will be interesting to see whether the Government places greater emphasis on the roll of mediation within the Code by making it a specific requirement rather than merely mentioning it within the Foreword. This may (if properly conducted) have the desired effect of reducing the number of claims although mediation is itself an expensive process. The introduction of a costs regime similar to that pursuant to the CPR regime would perhaps have a more profound effect.

50. Without developments like these, it is not only likely that the Code will not achieve its stated aim but that the Code will actually be a greater thorn in the side of employers than the old regime was. The verdict: employees can issue that sigh of relief. Employers would do better to hold their breath.

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