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STATUTORY DISPUTE RESOLUTION PROCEDURES

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Introduction

Part 3 of the Employment Act 2002 ("the Act"), which sets out the statutory dispute resolution procedures, came into effect on 1 October 2004. The Employment Act (Dispute Resolution) Regulations 2004 ("the Regulations"), which came into force on the same day, concern the application and operation of those procedures. The procedures are intended to encourage dispute resolution in the workplace and reduce the number of Tribunal applications. It remains to be seen whether these complex and confusing provisions will have the desired effect.

The statutory disciplinary and dismissal and grievance procedures apply to all employees and employers, regardless of the size of the employer's organisation.

Dismissal and Disciplinary Procedure

Standard procedure

The standard dismissal and disciplinary procedure ("DDP") applies when an employer contemplates dismissal. The DDP covers any type of dismissal (except constructive dismissal) including dismissal on the grounds of conduct, capability, redundancy, non-renewal of a fixed term contract, and compulsory retirement.

The standard DDP will also apply when the employer is contemplating disciplinary action short of dismissal based on an employee's conduct or capability. However, surprisingly, it will not apply to suspension on full pay or the issuing of warnings (whether oral or written), despite the fact that warnings are among the most common disciplinary actions in the context of misconduct or poor performance. This means that the DDP will apply to suspension without pay or on reduced pay, demotion, transfer, or loss of benefits.

Step 1	*Statement of Grounds and Invitation to Meeting* • The employer must set out in writing the employee's alleged conduct which led the employer to contemplate dismissing or taking disciplinary action • The employer must send the statement or a copy of it to the employee • The employer must invite the employee to a meeting to discuss the matter
Step 2	*Meeting* • The meeting must take place before action is taken (except suspension) • The meeting must not take place unless the employer has informed the employee of the basis for the grounds given in the statement, and the employee has had a reasonable opportunity to consider his response • The employee must take all reasonable steps to attend the meeting • After the meeting, the employer must inform the employee of its decision and notify him/her of the right to appeal • Employees have the right to be accompanied at the meeting
Step 3	*Appeal* • The employee must inform the employer if s/he wishes to appeal • The employer must invite the employee to attend a further meeting • The employee must take all reasonable steps to attend the meeting • The employer should be represented by a more senior manager than attended the disciplinary meeting • After the appeal meeting, the employer must inform the employee of its final decision • Employees have the right to be accompanied at the meeting

Modified Procedure

The modified DDP applies when an employer dismisses an employee for gross misconduct, without notice or pay in lieu of notice, and it was reasonable for the employer to dismiss the employee without any prior investigation. In reality, the modified DDP will apply rarely, and reliance on it by employers would be extremely risky.

The modified DDP does not apply where the employee presents a complaint to a tribunal before the employer has written to the employee setting out the employee's alleged misconduct (step 2 below).

Step 1	*Statement of grounds for action* • The employer must set out in writing: (i) the employee's alleged misconduct which led to the dismissal (ii) what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and (iii) the employee's right to appeal against dismissal • The employer must send the statement or a copy to the employee
Step 2	*Appeal* • The employee must inform the employer if s/he wishes to appeal • The employer must invite the employee to attend a further meeting • The employee must take all reasonable steps to attend the meeting • After the appeal meeting, the employer must inform the employee of its final decision

Exceptions to the dismissal and disciplinary procedure

The DDP does not apply to the following categories of dismissal:

(i) dismissal followed by re-engagement in certain circumstances
(ii) some collective redundancies
(iii) industrial action dismissals
(iv) constructive dismissals
(v) unforeseen cessation of employer's business
(vi) dismissals where continued employment of the employee would contravene a legal duty or restriction
(vii) the employee is covered by a dismissal procedures agreement.

Circumstances in which parties are treated as complying with dismissal and disciplinary procedure

The parties are treated as complying with the appeal stage of the DDP if an employee makes a claim for interim relief or an employee has appealed under an appropriate procedure made under a collective agreement.

Grievance Procedure

What is a grievance?

A grievance is defined in the Regulations as "a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him". This would cover complaints about actions of a third party in circumstances where an employer could be vicariously liable for those actions. An action includes an act or omission.

The statutory grievance procedures apply 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. Issuing a discrimination questionnaire does not count as a grievance statement.

Standard procedure

Step 1	*Statement of grievance* • The employee must set out the grievance in writing and send the statement or copy to the employer
Step 2	*Meeting* • The employer must invite the employee to a meeting to discuss the grievance • The meeting must not take place unless the employee has informed the employer of the basis for the grievance, and the employer has had a reasonable opportunity to consider his response • The employee must take all reasonable steps to attend the meeting • After the meeting, the employer must inform the employee as to its response to the grievance and notify him/her of the right to appeal • Employees have the right to be accompanied at the meeting

(continued on next page)

Step 3	*Appeal* • The employee must inform the employer if s/he wishes to appeal • The employer must invite the employee to attend a further meeting • The employee must take all reasonable steps to attend the meeting • The employer should be represented by a more senior manager than attended the disciplinary meeting • After the appeal meeting, the employer must inform the employee of its final decision • Employees have the right to be accompanied at the meeting

Modified procedure

The modified grievance procedure applies where the employment has ended and either the employer was unaware of the grievance before the employment ended or the standard grievance procedure was not commenced or completed by the time employment ended. In addition, both parties must have agreed in writing that the modified procedure would apply to the grievance.

Step 1	*Statement of grievance* • The employee must set out in writing the grievance and the basis for it, and send the statement or a copy to the employer
Step 2	*Response* • The employer must set out its response in writing and send the statement or a copy to the employee

Exceptions to the grievance procedure

The statutory grievance procedures do not apply where an employee makes a protected disclosure within the meaning of the Public Interest Disclosure Act 1998. The provisions of PIDA will always take precedence. This gives employees the right to choose whether to raise a concern as a grievance or protected disclosure.

Neither of the grievance procedures will apply if employment has ended, no procedure has been commenced and since the end of employment, it has ceased to be reasonably practicable to send the step 1 letter.

Neither of the grievance procedures apply where the employer has dismissed or is contemplating dismissing the employee; nor do they apply where the employer has taken or is contemplating taking disciplinary action on the basis of capability or conduct. In these cases, the DDP applies instead (see the section on 'overlap' below).

Circumstances in which parties are treated as complying with grievance procedures

The parties will be treated as having complied with the grievance procedures where:

(i) the grievance is raised in writing during a DDP or before presenting a complaint to a tribunal, where the grievance is that the employer has taken or is contemplating taking disciplinary action which would amount to unlawful discrimination or that the grounds for the disciplinary action are not those relied on by the employer

(ii) since the end of employment is has ceased to be reasonably practicable for the employee to complete the grievance procedure

(iii) the grievance is raised collectively on behalf of a number of employees by an elected representative or trade union official

(iv) an alternative, collectively agreed dispute resolution procedure exists, and the employee has raised his or her grievance using that procedure.

Exemptions which apply to all statutory procedures

The statutory procedures do not apply, or are treated as being complied with, where:

(i) one party has reasonable grounds to believe that commencing or completing the procedure would result in a "significant threat" to any person (including that party) or any person's property;

(ii) one party has been subject to harassment and has reasonable grounds to believe that commencing or completing the procedure would result in further harassment; or

(iii) it is not practicable for the party to commence the procedure or comply with a subsequent requirement within a reasonable period.

In addition, if complying with statutory dispute resolution procedures would require the disclosure of information which would be contrary to the interests of national security, neither party is required to comply with the procedures.

If the employer, employee or employee's companion cannot attend a step 2 or 3 meeting for a reason that was not reasonably foreseeable at the time the meeting was arranged, the employer is obliged to rearrange the meeting. However, if the meeting is cancelled for a second time for unforeseeable reasons, both parties will be treated as having complied with the procedures, and neither party will be held at fault for failure to complete the procedure.

Consequences of failure to comply

The consequences of failure to comply with the statutory dispute resolution procedures are extremely serious.

Automatic unfair dismissal

If the employer fails to follow the DDP and the employee who is qualified to do so brings a claim for unfair dismissal, the dismissal will be automatically unfair. No question of reasonableness will arise – the dismissal will be deemed to be unfair

under the new section 98A(1) of the Employment Rights Act 1996 (inserted by s.34 of the Act). In these circumstances, the employee will generally receive a minimum of four weeks' pay as compensation.

Section 98A(2) provides that tribunals are obliged to disregard failures by employers to follow procedures outside the statutory procedures (eg contractual procedures), provided that compliance with such additional procedures would have had no effect on the decision to dismiss. These provisions represent a partial reversal of the *Polkey* decision.

Section 98A(1) does not apply in reverse: compliance with the statutory procedures does not make the dismissal automatically fair. It is still necessary to establish that the dismissal is for a potentially fair reason and that the employer acting reasonably in dismissing.

Adjustment of awards

Where statutory procedures apply and have not been complied with, and this failure is wholly or mainly attributable to the employer, the Tribunal must increase any award by 10 per cent, and may, if it considers it just and equitable, increase it by up to 50 per cent. (This is in addition to a finding of automatic unfair dismissal).

Where the failure to comply with the statutory procedures is wholly or mainly attributable to the employee, the Tribunal must reduce any award which it makes to the employee by 10 per cent, and may, if it considers it just and equitable, reduce it by up to 50 per cent.

If the statutory procedures have been followed but the Tribunal finds the dismissal substantively unfair, there will be no adjustment of the award.

Where there are "exceptional circumstances", the Tribunal is not obliged to reduce or increase an award. Any adjustment to an award occurs before any reduction to the compensatory award for contributory fault and before the imposition of the statutory

cap on the compensatory award. This means the new procedures will not affect the statutory limit for compensatory awards.

Admissibility of complaints

An employee will not be permitted to bring a complaint based on a grievance unless the employee has written the step 1 letter and allowed 28 days to pass. Once this requirement is met, the employee can bring a complaint provided it is not out of time. There are no admissibility requirements for claims arising out of the DDP.

Overlap between statutory procedures

The statutory procedures are at their most complex and confusing when they overlap. The most obvious example of overlap is where an employer takes disciplinary action against an employee, which prompts the employee to raise a grievance, either about that action or about some other matter.

Where the action taken or contemplated by the employer is:

(i) dismissal (other than constructive dismissal), the statutory grievance procedure does not apply. The employee's remedy is to appeal under the DDP.

(ii) paid suspension or a warning, the statutory grievance procedure applies instead of the DDP.

(iii) disciplinary action based on conduct or capability, then the statutory grievance procedure does not apply. The standard DDP must be followed.

(iv) disciplinary action asserted to be based on conduct or capability, but either the employee considers that the disciplinary action amounts to unlawful discrimination or the action is really being taken for reasons other than conduct or capability, then the grievance procedure applies. If the written grievance is raised before the appeal stage of the DDP, the employee will be treated as having complied with the grievance

procedure. Otherwise, the grievance procedure must be completed in full.

Extension of time limits

The Regulations will in certain circumstances extend the normal time limits for submitting Tribunal claims. In the case of the DDP, where an employee has reasonable grounds for believing a dismissal or disciplinary procedure is still ongoing when the normal time limit expires, the time limit is extended by three months. In the case of grievance procedures, where the employee presents a complaint to a Tribunal within the normal time limit but s/he has not sent the Step 1 letter and allowed 28 days to pass, this will trigger a three-month extension of the time limit (within which the employee must send the Step 1 letter). Alternatively, where the employee sends the Step 1 letter within the normal time limit, this will trigger a three-month extension of the time limit.

Written statements of terms and conditions

Employers are required to give employees a written statement of employment particulars within the first two months of employment. The Act now requires employers, regardless of size, to specify the new minimum statutory dispute resolution procedures in the written statement. However, employers are given some flexibility about what will constitute the written statement. It will be acceptable to communicate these particulars through a contract of employment or letter of engagement. The small employer exemption no longer applies.

Where the employer fails to provide proper written particulars, and the employee brings a complaint in the Tribunal under any of the main jurisdictions and wins, the Tribunal can make a stand-alone award of, or increase its award by, two or four weeks' pay.

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