

## **The statutory dismissal and grievance procedures: hindsight is a wonderful thing**

In October 2004, new dismissal and grievance procedures came into effect. The new rules brought about substantial changes to the law on unfair dismissal. Under this regime which is still current, an employee's dismissal will be automatically unfair if an employer does not follow the statutory termination procedure and an employee cannot bring a constructive dismissal or a discrimination claim without first raising a written grievance. Both employees and employers face an adjustment to the damages of up to 50% to reflect their non-compliance with the statutory procedures. The aim of this legislation was to help reduce the number claims going to tribunal and to provide a simple procedure that would be easy for employers to follow. In true style, the new procedure achieved neither aim and in 2006, the Government admitted defeat and began to consult about what could possibly replace these procedures.

After an initial report and subsequent consultation, the Employment Bill was published and it continues its way through Parliament. Its aim is to repeal the statutory disciplinary and grievance procedures. But what will they be replaced by?

### **A short trip down memory lane**

Since the 70's, the courts have set the guidelines as to what procedure should be followed when terminating an employee's employment. For example, it was established that employers should consult with their employees with regard to alternatives to redundancies before making someone redundant.

Before 2004, case law had established that if an employer failed to comply with a procedure, that dismissal would be found unfair, even if the employer could show that the failure did not affect the outcome. However, a percentage of the compensation award could be deducted to reflect the likelihood that the dismissal would have gone ahead even if the correct procedure had been followed. This was commonly referred to as a Polkey deduction in honour of Mrs Polkey, who brought the case that established the use of these deductions.

The statutory termination procedure is mostly concerned with the termination and appeal hearings and aims to ensure that employees have their say before their employment is terminated.

Under the current regime, if the employee is not given his or her say before termination, it is an automatic unfair dismissal. There will be damages owed, however, the likelihood of the dismissal going ahead anyway remains very relevant to the calculation of damages. If any other procedure was not followed, (in our example, if the employee was not consulted about the redundancy before the consultation meeting) the finding could be one of fair dismissal, if following the correct procedure would have made no difference.

### **When will the new regime start?**

Subject to the completion of the parliamentary process, on 6 April 2009 the Employment Act 2002 (Dispute Resolution) Regulations 2004 will be repealed and will be replaced by the provisions of the Employment Act 2008.

### **What will the new regime look like?**

This is a quote from the BERR web site:

“From 6 April 2009, the mandatory “three-step” processes for disciplinary and dismissal procedures raised by an employer and for grievances raised by an employee will be repealed. Employment tribunals will decide cases on the basis of what is ‘fair and reasonable’ and a revised Acas Code of Practice and non-statutory guidance on disciplinary and grievance procedures will establish the principles of what an employer and employee should do. Employment tribunals will have discretionary powers to adjust awards by up to 25% if an employee or employer has acted unreasonably in not following the principles in the new Acas Code. As a result, employees and employers will have greater flexibility to deal with workplace discipline and grievance issues in a way which suits them best.”

The Acas Code of Practice is still in its draft form. Its content is not revolutionary. The guidelines to using fair dismissal and grievances procedures still reflect the basic principles that have evolved since the 70s.

Under the new regime, a dismissal will not be automatically unfair if the procedure has not been adhered to and an employee will not be debarred from bringing proceedings if he or she failed to bring a grievance prior to issuing proceedings.

Essentially, we have the old regime with some bells and whistles.

### **Will the new regime be better than the current?**

There were some very compelling arguments for the repeal of the statutory grievance and dismissal procedures. Our clients, both individual and business, have been particularly affected by two of the most commonly cited:

- the procedures led to the formalisation of disputes (particularly grievances) at an early stage;
- parties quickly become focussed on procedure rather than the reasons why the procedure is being followed.

The new regime should help put the focus back on the issue at hand. However, if you follow no procedure at all, it is very likely that any dismissal or grievance outcome will be unfair. This was the case under the old regime, and it will not change under the new.

The new regime will no doubt do its best to provide some sort of framework for business and individuals to resolve disputes but it is simply not possible to provide the perfect answer. The difficulty with any legislation that tries to regulate dispute resolution is that it does not and cannot take into account the extraordinary capacity that people have to confound common sense.

Will the new regime see a decrease in the number of tribunal claims? Probably not. In these days of economic unrest, we are getting busier. Employers do not have enough money to pay large ex gratia sums to settle existing or potential disputes and employees feel that they face years of unemployment and are not prepared to accept low settlements. The settlement figures reached in our negotiations are now based more on the strength of the case and less on commercial offers. This means that

whether you are dealing with a grievance or a dismissal, following the correct procedure (whatever that is) is more important than ever.

So, will the new regime be better than the current? It will at least do away with one unnecessary layer of complexity. Apart from that, it will be different, and that's probably as much as any of us can expect.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 12 33741, or email us at [info@employease.co.uk](mailto:info@employease.co.uk).

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