

Disciplinary and grievance procedures in transition

Celebrations over the demise of the statutory dispute resolution procedures on 6 April 2009 may be somewhat premature since it is clear that the troublesome procedures won't be slipping away quietly. They will certainly linger into 2010 and their presence may even continue into 2011 and beyond as claims make their way through the appeal process. The immediate future will see employers and employees navigating the transition, where the existing procedures will sit alongside the revised Acas Code of Practice, which sets out the principles of what an employer and an employee should do to achieve a reasonable standard of behaviour from 6 April. In this article we explain the transitional procedures that determine whether the old or new regime applies, as well as taking a brief look at a number of other related changes.

This article follows on from the Q&A in Brief 871 on the Acas Code of Practice on Disciplinary and Grievance Procedures and its accompanying guidance. As explained in the Q&A, the outgoing statutory dispute resolution procedures are far from straightforward and their application has had the unintended consequence of accelerating the litigation process in many cases, with both parties seeking legal advice at an earlier stage to ensure compliance. The draconian consequences for failing to comply – which have resulted in employees being denied access to a hearing of their claim, employers facing findings of automatically unfair dismissal for procedural failings, and possible increases or decreases in compensation awards by up to 50 per cent – have also drawn censure.

After the Government-commissioned review of the statutory procedures recommended their repeal and replacement, there followed a period of public consultation that culminated in the introduction of the dispute resolution provisions in the Employment Act 2008. With effect from 6 April 2009 these will, among other things, repeal Ss.29 to 33 and Schedules 2 to 4 of the Employment Act 2002, including the Employment Act 2002 (Dispute Resolution) Regulations 2004 SI 2004/752, and S.98A of the Employment Rights Act 1996 – the provision that makes a dismissal automatically unfair if the employer has failed to follow a relevant procedure. From that date, the statutory dismissal and disciplinary procedures (DDPs) and grievance procedures (GPs) will cease to apply to new disputes and it will no longer be essential to follow a three-step disciplinary and dismissal or grievance procedure. Instead, parties will be expected to comply with the revised Acas Code of Practice in most situations involving discipline and grievance (the exceptions being redundancy dismissals and dismissal on the expiry of a fixed-term contract).

As far as determining liability is concerned, a failure to follow the Code's procedures will only be relevant to unfair dismissal claims and claims about the right to be accompanied. The main consequence of not following the Code is, in certain cases, a possible adjustment to compensation (up or down) of up to 25 per cent in a subsequent employment tribunal claim. In addition, as explained in the Q&A in Brief 871, the Code only applies

to employees (except in respect of complaints by workers about the right to be accompanied).

However, the DDPs and GPs will not disappear overnight – they will continue to apply to disputes where the 'trigger event' occurs before the cut-off dates set out in The Employment Act 2008 (Commencement No.1, Transitional Provisions and Savings) Order 2008 SI 2008/3232 (for which, see below). Where they do still apply, the associated three-month extension for bringing a tribunal claim, the compensation adjustments and the automatic unfair provisions will also apply.

Determining which regime applies

The different consequences that flow from failing to follow either the old or the new regime mean that it is vital to know which one applies. This will depend on establishing when the trigger event has occurred. In this regard, it should be noted that parties to a dispute cannot agree to the case being dealt with under one regime or the other: the regime that applies is determined by the transitional provisions in the Order.

Where the trigger event occurs before 6 April, the existing procedures continue to apply. Where it occurs on or after 6 April, they do not. There are different trigger events depending on whether a grievance or a disciplinary situation arises.

Cut-off dates – grievances

The trigger for a grievance procedure will be the date of the action about which the employee complains.

As noted above, if the action occurred wholly before 6 April 2009, the existing GPs continue to apply. However, they also apply if the action complained of began on or before 5 April 2009 and *continues* beyond that date and the employee has submitted a written grievance or an employment tribunal claim (an ET1):

- on or before 4 July 2009 if it relates to a jurisdiction with a three-month time limit (as it is in most cases; for example, constructive dismissal and discrimination claims) or
- on or before 4 October 2009 if it relates to a jurisdiction with a six-month time limit (namely, equal pay or redundancy payments claims, and claims for dismissals

The statutory dispute resolution procedures will continue to apply to issues that have arisen up to and including 5 April 2009. These include:

- the standard three-step and modified two-step procedures
- the three-month extension to the time limit in which a tribunal claim must be brought
- the compensation award adjustments of 10–50 per cent for procedural unfairness
- the scope for findings of automatic unfair dismissal in the event of non-compliance with the dismissal procedures (S.98A ERA).

taken in connection with industrial action (S.238 of the Trade Union and Labour Relations (Consolidation) Act 1992). N.B. It is not clear why dismissals are included in the Order.

This means that some claims to which the existing grievance procedures apply may not be heard by a tribunal until 2010. Cases that require ongoing case management discussions, which are not uncommon in, for example, the equal pay arena, or those that end up appealed, may even run into 2011.

For the jurisdictions to which the above rules apply, and the relevant time limits, see the box on page 17.

Cut-off dates – disciplinary and dismissal cases

The trigger date for determining which regime applies to disciplinary action or dismissal will be the date when the employer has started the disciplinary or dismissal action. This will usually be the date that a Step 1 letter was sent to the employee or the date of the Step 2 meeting. If neither step has been taken, it will be the date of the disciplinary action or dismissal.

The existing DDPs will therefore apply if on or before 5 April 2009 the employer has:

- sent the employee a Step 1 statement or held a Step 2 disciplinary or dismissal meeting, or
- taken relevant disciplinary action against the employee, or
- dismissed the employee.

Under the standard procedure, the Step 1 statement must set out in writing the employee's alleged conduct, characteristics or circumstances which led the employer to contemplate dismissing or taking disciplinary action against the employee. Where the modified procedure is used, the employer must set out in writing the employee's alleged misconduct which has led to the dismissal and the basis for believing at the time of the dismissal that the employee was guilty of the alleged misconduct.

BERR examples

The following examples taken from the guidance issued by the Department of Business, Enterprise and Regulatory Reform (BERR) on the application of the transitional provisions show how they will work in practice.

Dismissals (involving disciplinary/dismissal procedures)

- A is issued with a Step 1 letter on 15 March 2009 and is dismissed on 5 April 2009. On 4 July 2009 she has reasonable grounds for believing that the dismissal procedure is being followed and receives a three-month extension until 4 October. Although the case is not heard at an employment tribunal until December 2009, the **old regime** (the DDPs) applies as the employer had taken a step under the DDP on or before 5 April 2009.
- B is dismissed on 6 April 2009 but his employer had issued a Step 1 letter in March 2009. He makes an unfair dismissal claim on 6 May 2009. The **old regime** applies as his employer had taken a step under the DDP on or before 5 April 2009.
- C is dismissed on 6 May 2009 following a Step 1 letter on 6 April 2009. She makes a claim for unfair dismissal on 4 July 2009. The **new regime** applies as her employer took action on or after 6 April 2009.

Employer takes action which forms the basis of a grievance in jurisdictions with a three-month time limit

- The employer takes action on 10 January 2009 which continues beyond 6 April 2009. D submits a written grievance on 7 April 2009 and issues a tribunal claim which is heard in December 2009. The **old regime** applies (GPs) as the action began on or before 5 April 2009 and continues, and the grievance was put in before 4 July.
- The employer takes action on 10 January 2009 which stops on 10 February 2009. E submits a written grievance on 11 February 2009 and makes a tribunal claim on 7 April 2009. The **old regime** still applies as the action took place before 6 April 2009.
- The employer takes action on 10 January 2009 which continues until 9 January 2010. F submits a written grievance on 10 January 2010 and makes a tribunal claim. The **new regime** applies as, although F may have had grounds for a grievance before 6 April 2009, she submitted the written grievance (or the tribunal claim) after 4 July 2009.
- The employer takes action on 5 April 2009 which continues until 5 May 2009. G submits a written grievance on 5 July 2009 followed by a tribunal claim on 4 October 2009, which is heard in January 2010. The **new regime** applies as G submitted his grievance (or tribunal claim) after 4 July 2009.
- The employer takes action on 6 April 2009 which continues until 5 November 2009. H submits a written grievance on 6 November 2009, makes a tribunal claim on 4 May 2010, and the case is heard during 2010. The **new regime** applies as the employer's action took place on or after 6 April 2009.

Employer takes action which forms the basis of a grievance in jurisdictions with a six-month time limit

- The employer takes action on 10 January 2009 which continues beyond 6 April 2009. I submits a written

grievance on 7 April 2009. The tribunal claim is heard in December 2009. The **old regime** applies as the act began before 6 April 2009 but continues, and the grievance is put in on or before 4 October.

- The employer takes action on 10 January 2009 which continues until 9 January 2010. J submits a written grievance on 10 January 2010 and makes a tribunal claim. The **new regime** applies as, although J may have had grounds for a grievance before 6 April 2009, she submitted her written grievance after 4 October 2009.
- The employer takes action on 5 April 2009 which continues until 5 May 2009. K submits a written grievance on 5 June 2009 and makes a tribunal claim on 3 October 2009, and the case is heard by a tribunal in January 2010. The **old regime** applies as she submitted her written grievance (or presented her tribunal claim) before 4 October 2009.
- The employer takes action on 5 April 2009 which continues until 5 November 2009. L submits a written grievance on 7 November 2009 and makes a tribunal claim on 4 May 2010, and the case is heard during June 2010. The **new regime** applies as the action continued beyond 5 April 2009 and the written grievance was submitted (or ET1 presented) after 4 October 2009.
- The employer takes action on 6 April 2009 which continues until 5 November 2009. M submits a written grievance on 6 November 2009 and makes a tribunal claim on 4 May 2010, and the case is heard during June 2010. The **new regime** applies as the employer took action after 6 April 2009.

The BERR guidance is available on its website. However, the examples of grievances are pretty straightforward and are devised so that in those cases with a three-month time limit (the majority of claims) there is an ultimate cut-off date of 4 July 2009 for presenting a grievance and a cut-off date for presenting an ET1 in respect of those grievances of 4 October 2009 (assuming a three-month extension has been granted). There may, however, be cases governed by the three-month time limit which, despite being presented on or after 5 October 2009, are nevertheless covered by the old regime. This possibility was canvassed by one commentator, Barry Clarke, a director of Byrne Dean, in a recent lecture at the Employment Lawyers Association. Briefly, both examples he puts forward involve individuals who have put in a grievance *before* 6 April 2009. In one scenario the employee's grievance concerns an act of continuing discrimination that continues well beyond 5 October 2009, while the other concerns an employee's grievance (again made before 6 April) about the employer's behaviour which forms part of a course of conduct that results in the individual later resigning following a 'last straw', again well after 5 October 2009, and claiming constructive dismissal.

Jurisdictions

The jurisdictions to which the statutory GPs continue to apply are as follows.

Jurisdictions with a three-month time limit:

- discrimination on all unlawful grounds (sex, race, disability, religion or belief, sexual orientation and age)
- inducements relating to trade union membership or activities or collective bargaining
- detriment in relation to trade union membership and activities and union recognition rights
- unauthorised deductions and payments
- detriment in employment under S.48 ERA
- unfair constructive dismissal
- detriment in relation to the national minimum wage
- breach of contract arising on termination of employment
- breach of Working Time Regulations
- detriment relating to European Works Councils
- detriment in employment under the European Public Limited-Liability Company Regulations 2004, Information and Consultation of Employees Regulations 2004 and Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006
- detriment in relation to involvement in a European Cooperative Society
- detriment in relation to involvement in the establishment or activities of a special negotiating body (the function of which is to reach an employee participation agreement between merging companies) or enforcement of other rights under the Companies (Cross-Border Mergers) Regulations 2007
- breach of the Cross-border Railways Services (Working Time) Regulations 2008.

Jurisdictions with a six-month time limit:

- equal pay
- redundancy payments
- unfair dismissal in connection with industrial action (under S.238 TULR(C) Act 1992).

These summaries do not do justice to the sophisticated legal arguments on which they are based, that the grievances lodged before 6 April 2009 are extant to cover grievances continuing for long periods afterwards, but are mentioned here to warn legal advisers that there will be some situations where claims under the old regime may be presented to tribunals well into 2010 or beyond, 'and certainly far longer than a cursory reading of the Transitional Order might suggest'. The most likely reason why this might happen is that, in certain circumstances, the time limit for presenting claims under the old regime can be extended, with the effect that claimants will be looking for ways of saving their out-of-time claims under the new regime. Accordingly, this is an area where there may well be litigation about which regime applies.

Choosing a regime

As noted above, a number of key dates determine which regime applies. That said, by choosing when to take action about a particular matter, employers may have a certain amount of control over this issue, at least during the transitional period. For employees, there may be less choice since they will be responding to action taken by the employer, but since the uplift to an award is potentially higher under the existing regime than under the incoming one, the incentive may be to make a grievance or submit a tribunal complaint within the above-mentioned time limits. However, there may be circumstances where employees decide to delay making a tribunal claim – time limits permitting. One would be where there is a series of unlawful deductions of wages starting before 6 April but continuing after that date, since from 6 April, tribunals will have a new power to award additional financial losses incurred as a result of an employer's unlawful deduction (see below).

Parallel regimes

As BERR points out in its guidance, a few cases which are decided under the pre-6 April 2009 regime may still be running into 2010 – for example, a claim submitted for an event which occurred on 3 April 2009 where a six-month time limit plus a three-month extension applies, which then takes three months to get to a hearing, will not reach the tribunal until 2010. BERR states that it is inevitable that there will be a period of parallel regimes to avoid taking away rights provided under the pre-6 April regime, adding that it will be clear which regime applies to any particular case. Nevertheless, the possibility that the old regime will operate well beyond the dates envisaged in the Transitional Order should be borne in mind – for which, see the discussion of grievances above.

Unfair dismissal

Under the new regime, a failure to follow the Acas Code's procedures will not make a dismissal automatically unfair. This differs from the current regime whereby S.98A(1) ERA, which is being repealed, provides that an employee who is dismissed shall be regarded as unfairly dismissed where the employer does not complete the DDPs in respect of the employee. Also being repealed is S.98A(2), which governs the situation where a dismissing employer has not infringed the DDPs, but has otherwise failed to follow a fair procedure. This section provides that an employer's failure in this situation shall not render the dismissal unfair if the employer can show that he would have decided to dismiss the employee if he had followed the procedure. S.98A(2) brought about a partial reversal of the principle established in *Polkey v AE Dayton Services Ltd* 1988 ICR 142, which did not allow for the possibility of the 'no difference' argument except where following a procedure would have been 'futile'.

We will therefore see a return of the 'Polkey' argument, by which it will not be possible for an employer to invoke the no difference argument when defending a failure to adopt a fair procedure, whether in the Acas Code or, for example, in the employer's disciplinary rules.

Under the new regime, however, compensation in certain cases may, at the tribunal's discretion, be increased by up to 25 per cent to reflect the employer's unreasonable failure to follow the Acas Code of Practice. For further detail, see the Q&A in Brief 871.

Other changes

Section 7 EA 2008 introduces a new power for employment tribunals to award additional financial loss to workers who have brought successful claims for either a redundancy payment or unlawful deduction of wages where that loss is attributable to the employer's non-payment. The amount that a tribunal can award must be 'appropriate in all the circumstances'. This new power does not apply to claims that have been presented to employment tribunals before 6 April 2009.

Note that S.38 EA 2002 has not been repealed, which means that a claimant who succeeds in a claim under any of the jurisdictions listed in Schedule 5 of that Act will be entitled to an award of two to four weeks' pay (in addition to any other compensation awarded) if his or her employer has not provided him or her with a statement of employment particulars as required under S.1 ERA. Those jurisdictions are the same as those listed in the box above to which the GPs apply, with the addition of claims for a breach of S.38 itself and unfair dismissal.

What happens now?

According to BERR, the new regime offers a more flexible, 'simpler and less prescriptive system' and has the 'potential to save business thousands of pounds'. It may be that the existing three-step procedures that employers have had to introduce will comply with the new Code of Practice, since its general principles still require the employer or employee to be notified of the problem, a meeting to discuss it and the opportunity to appeal. However, the lack of prescription may lead to less certainty about whether the Code has been followed. It is also unclear what would make a failure to follow the Code 'unreasonable' and lead to an adjustment in compensation.

Related articles:

The revised Acas Code of Practice on disciplinary and grievance procedures is explained in the Q&A in Brief 871.

Details of relevant changes to the Tribunal Rules, in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 2004/1861, including the abolition of the Acas fixed periods of conciliation, are explained in Brief 870.