THE EMPLOYMENT ACT 2002

INTRODUCTION

1. The Employment Act 2002 ("the Act") received Royal Assent on the 8th July 2002. The main changes introduced by the Act concern:
   (a) Paternity/maternity/adoptive parental rights – together with the right to request flexible working.
   (b) Changes to the substantive law of unfair dismissal.
   (c) Changes to the Employment Tribunal Procedure.

2. The purpose of this paper, is to concentrate on the considerable changes which the Act brings about to the substantive law of unfair dismissal and deal briefly with the most important potential changes to Employment Tribunal Procedure.

UNFAIR DISMISSAL – *Purpose Behind the Changes*

3. The changes have been provoked by the dramatic increase in the number of claims being made to Employment Tribunals (the number of complaints to Tribunals having trebled to 130,000 from 1990 to last year). At the heart of the thinking behind the changes is the belief, following consultation, that proper disciplinary and grievance procedures are likely to lead to a larger number of potential complaints being resolved without the need to involve an Employment Tribunal. The new provisions brought in by the Act aim to encourage the parties to resolve their differences if at all possible by use of proper internal procedures.

4. Many complaints to Employment Tribunals involve employers without *any* internal disputes procedures at all. In particular, small employers with no or inadequate procedures account for a disproportionately high share of tribunal claims with such businesses employing only 18% of the workforce but accounting for a third of all tribunal claims. At the heart of the new Act, therefore, is the creation of compulsory

disciplinary and grievance procedures – together with a blend of adverse consequences for a party that fails to follow the procedure.

THE ACT ITSELF

5. Although the Act gained Royal Assent on 8th July 2002, the relevant provisions relating to unfair dismissal are not in force as yet. The relevant provisions in the Act regarding dispute resolution and unfair dismissal are contained in sections 29-40 (together with schedules 2-5). The Act will operate partly by amending certain aspects of the Employment Rights Act 1996 ("ERA"). There are a number of additional free-standing enabling provisions, which empower the Secretary of State to make regulations along lines set out in the Act. In many ways the Act represents skeleton – which will in due course be fleshed out by the regulations following a further consultation period over the coming winter. No timetable has been fixed as yet – although it is likely the unfair dismissal aspects of the Act and the regulations will not come into force until the latter half of next year.

STATUTARY DISMISSAL AND DISCIPLINARY PROCEDURE

6. At the centre of the changes brought to the law of unfair dismissal by the new Act, are the statutory dismissal/disciplinary procedures (DDPs) and grievance procedures (GPs).

7. The effects of section 29 and 30 of the Act are to imply minimum DDP and GP into every contract of employment. Section 30 (2) precludes the employer/employee from contracting out of this provision. That is not to say, of course, that the parties cannot agree to *more extensive* DDP and GP, simply that they cannot contract out of the bare minimum provided for by the Act.

8. Dealing first with the DDPs these are contained in Schedule 2 of the Act. Two separate procedures are set out where an employer is considering disciplining or dismissing an employee: a "standard procedure" and a shorter "modified procedure".

The Act does not spell out how the employer is to choose in a particular case between the two procedures. The Regulations made under the Act are expected to deal with that matter. However, looking at the two procedures it seems likely that the intention is (as one might expect from its name) that the standard procedure will apply to the majority of cases, whilst the modified procedure will apply in cases of extreme misconduct where an urgent response is called for.

9. The standard procedure can be seen to be a three stage process requiring:

Step 1 *statement of grounds*

- The employer must set out in writing the employee's alleged conduct or characteristics , or other circumstances, which led him to contemplate dismissing or taking disciplinary action against the employee.

- The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2 *meeting*

- The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.
- The meeting must not take place unless –
  (a) The employer has informed the employee what the basis was for including in the statement under Step 1 the ground or grounds given in it, and
  (b) The employer has had a reasonable opportunity to consider his or her response to that information.

- The employee must take all reasonable steps to attend the meeting.

- After the meeting, the employer must inform the employer of his decision and notify him or her of the right to appeal against the decision if he or she is not satisfied with it.

(Note also that - section 10 of the Employment Relations Act 1999 already provides that a worker is entitled to be accompanied by a fellow worker or T.U. representative to a hearing held under a grievance procedure or disciplinary hearing).

Step 3 *Appeal*

- If the employee does wish to appeal, he or she must inform the employer.

- If the employee informs the employer of his or her wish to appeal the employer must invite the employee to attend a further meeting.

- The employee must take all reasonable steps to attend that meeting.

- The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

- After the appeal meeting, the employer must inform the employee of his final decision.

10. The modified procedure is somewhat simpler, providing a two stage process, namely:

Step 1: *Statement of grounds*

- The employer must –

(a) set out in writing (I) the employee's alleged misconduct which has 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, and

(b) send the statement , or a copy of it, to the employee.

Step 2: *Appeal*

- If the employee does wish to appeal, he or she must inform the employer
- If the employee informs informs the employer of his or her wish to appeal, the employer must invite the employee to attend a meeting.
- The employee must take all reasonable steps to attend the meeting.
- After the appeal meeting the employer must inform the employee of his final decision.

11. There are general requirements laid out at the end of the Schedule (which also apply to the Statutory Grievance Procedures) as follows:

- Each step and action under the procedure must be taken without unreasonable delay
- Timings and locations of meetings must be reasonable
- Meetings must be conducted in a manner that enables both employer and employee to explain their cases
- In the case of appeal meetings which are not the first meeting, the employer should, so far as is reasonably practicable, be represented by a more senior manager than attended the first meeting (unless the most senior manager attended that meeting).

12. As noted above, the circumstances in which the Procedures will need to be used, and what would constitute compliance will be set out in regulations to be made under the Act. Questions that arise at this stage looking, for example, at the standard procedure are:
    (1) Will the appeal have to be a proper C.A. style appeal or a hearing *de novo* (or will it not matter)?
    (2) How much detail will need to be given of the basis for the matter being included in the statement sent to the employee?
    (3) What, if any, will the rules be as to what happens at the meeting (e.g. will there be a requirement that the employee be allowed to cross-examine witnesses). My own feeling is that, given that these provisions are being forced on employers, and implied by statute, the obligations imposed will be kept to a bare mimimun.

13. It is worth noting at this stage that the procedures will be of *contractual*, and accordingly the effect of breach may well be of relevance not only in relation to the fairness or otherwise of any dismissal. So, for example, a failure by an employer to comply with a DDP or GP may, if sufficiently serious, constitute a breach of contract entitling the employee to repudiate the employment contract, including any post-termination restrictive covenants.

THE STATUTORY GRIEVANCE PROCEDURE

14. Again, these are brought in by section 29 and 30 and will be fleshed out by regulations. Once more they are compulsory *minimum* standards, out of which the parties cannot contract, but which may be supplemented by the employment contract.

15. Schedule 2 Part 2 contains the 2 GP's – once more there is a 3 stage standard procedure and a 2 stage simplified modified procedure.

16. The standard procedure is as follows:

Step 1:*statement of grievance*

- The employer must set out the grievance in writing and sends the statement or a copy of it to the employer.

Step 2: *meeting*

- The employer must invite the employee to attend a meeting to discuss the grievance.
- The meeting must not take place unless:-
  (a) the employee has informed the employer what the basis for the grievance was when he or she made the statement under Step 1 above , and
  (b) the employer has had a reasonable opportunity to consider his response to that information.
- The employee must take all reasonable steps to attend the meeting.

- After the meeting the employer must inform the employee of his decision as to his response to the grievance and notify the employee of the right to appeal against the decision if the employee is not satisfied with it.

Step 3: *appeal*

- If the employee does wish to appeal, he or she must inform the employer
- If the employee informs the employer of his or her wish 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 his final decision.

17. The modified grievance procedure is a two stage process:

Step 1: *statement of grievance*

- The employee must –
  (a) set out in writing (I) the grievance and (ii) the basis for it
  (b) send the statement or a copy of it to the employer

Step 2: *response*

- The employer must set out his response in writing and send the statement or a copy of it to the employee.

18. The main difference between the two procedures can be seen to be the absence of a need for a meeting under the modified procedure. Although the Act is silent on the point, the modified procedure appears to be for use when the employee has already left employment – a meeting being impractical in this situation and an exchange of correspondence with the former employer being sufficient. The Government has also indicated that the GPs will probably not apply at all in cases of dismissal – save for constructive dismissal where the modified procedure will apply.

19. The Act itself does not spell out precisely which circumstances will bring the DDP's or GPs into play, although it is thought that the DDP's will apply in all dismissal cases (i.e. including redundancy cases). The Regulations made under the Act are expected to deal with this in some detail and, in addition to deal with:
    (a) when the procedures may be taken to be completed;
    (b) what will constitute proper compliance with the DDP's and GPs
    (c) the circumstances in which a person a person may be treated as not subject to a requirement;
    (d) the circumstances in which an employee will be required to exercise a right of appeal.

EFFECT OF THE NEW PROVISIONS ON UNFAIR DISMISSAL

20. As matters stand at present (ie prior to the Act's unfair dismissal provisions coming into force) there is effectively a 2-stage process. First, under section 98 (1) and (2) of the Employment Rights Act 1996 – the onus falls upon the employer to show a potentially fair reason for dismissal. Secondly, if the employer satisfies that test, the Tribunal examines under section 98 (4) whether the employer acted reasonably in treating that reason as a sufficient reason for dismissal . That second test calls for an analysis of whether the dismissal was both substantively and procedurally fair.

21. In Polkey v AE Dayton Services Ltd 1988 ICR 142, the House of Lords, held that where the employer failed to follow a proper procedure it was not open to the tribunal to consider (at a liability stage) whether had a proper procedure been followed the dismissal would have been reasonable. The dismissal would, therefore, still be unfair in these circumstances [although the question might well still result in a large, perhaps complete, reduction in the compensatory award because section 123 of the ERA provides for an award which is "*just and equitable in all the circumstances*"]. It has been argued that this judgement, by removing the so-called "no difference" test,

forces tribunals to put undue weight on questions of disciplinary procedure, rather than on the actual reasons for dismissal.

22. The Act impacts upon this position in 2 ways. First, as regards the key statutory DDP, Polkey is retained with full vigour. A new section 98 A (1) is added to the Employment Rights Act 1996 (by section 34 of the Employment Act 2002) making a dismissal *automatically* unfair if the statutory procedure has not been complied with and the reason for non-compliance is wholly or mainly attributable to the employer's failure to comply with its requirements. Compliance with the statutory procedures is, therefore, of the utmost importance. Consider, for example, a situation where the standard DDP applies but the employee is dismissed without being given an opportunity to attend a disciplinary meeting. That will constitute a breach of the statutory DDP – it will not be open to the employer, on liability, to argue that attendance at the meeting would have made no difference to the decision to dismiss.

23. However, it is important to remember that a Polkey reduction could still apply at the quantum stage – as it does now.

24. There is, however, something of an important concession to employers in a new section 98 (A) (2) – which effectively reverses the rule in Polkey for all other procedural irregularities where the employer can show on a balance of probabilities that the failure to follow the correct procedure would not have made any difference to the decision to dismiss.

QUANTUM CONSEQUENCES OF FAILING TO FOLLOW THE DDP OR GP

25. The parties are further encouraged to follow the provisions of the DDP and/or GP by virtue of the effects of section 31 of the Act. These sections effectively punish an employer for failing to follow the DDP/GP by enabling (indeed, obliging) the Tribunal to increase any award made in the proceedings as a result of a failure to follow the statutory procedure. They are reminiscent of costs/interest sanctions

imposed in the ordinary civil courts to encourage parties to follow pre-action protocaols and procedure.

26. In summary, if the statutory procedures apply to the matter before the Tribunal and the statutory procedure has not been completed before proceedings began, then the Tribunal is generally *obliged* to increase the compensatory award by a minimum of 10% if the failure to comply was attributable wholly or mainly to the employer.

27. Conversely, if the DDP or GP applies to the matter before the Tribunal and the procedure has not been completed because of reasons wholly or mainly attributable to the employee the Tribunal is generally obliged to reduce the compensatory award by a minimum of 10%.

28. In both instances, the Tribunal can only refuse to make a variation (or make a smaller variation) if there are "exceptional circumstances" which would make a variation inequitable.

29. These provisions have real teeth, particularly when one has regard to Section 31 which enables the Tribunal to increase the variation to as much as 50% if it considers it just and equitable to do so.

30. These provisions apply to the jurisdictions set out in Schedule 3 of the Act, which are the vast majority of all claims which can be presented to a Tribunal (including unfair dismissal, sex, race and disability discrimination claims).

31. In terms of the timing of applying the %, a new Section 124A in the Employment Rights Act 1996 provides that the adjustment is to be made before any reduction for contributory fault (but after any deduction for *ex gratia* payments or Polkey reductions).

32. The Secretary of State is given power under the Act to make regulations, specifying the circumstances in which a person will be treated as having complied with the statutory procedures even though all its steps have not been completed (i.e. there is a power to make regulations providing, effectively, for exemptions from the statutory provisions in certain circumstances).

33. Further, where the employee is found to have been automatically unfairly dismissed by reason of the new section 98 (A) (1) of the ERA (i.e. where the employer has failed to follow the DDP) a new section 20 (1A) ERA provides for a minimum basic award of 4 weeks pay.

FURTHER CONSEQUENCES OF FAILING TO COMPLY WITH GP FOR EMPLOYEE

34. Section 32 contains provisions preventing certain categories of complaint from being presented to tribunals until step 1 of the GP has been complied with and at least 28 days have elapsed. There is a power for regulations to be made about the application of the grievance procedure and what constitutes compliance.

35. The section applies to those jurisdictions listed in schedule 4 (which is wide ranging – again including sex, race, disability discrimination and unfair dismissal).

36. Its purpose, clearly, is to prevent proceedings being brought before matters have been ventilated properly in correspondence. So, for example, if an employee is badly treated at work, resigns and claims he has been constructively dismissed – then a failure to institute a grievance prior to commencing proceedings would preclude the Tribunal from hearing the claim.

37. Section 33 enables the Secretary of State to make regulations providing for the consequential extension of the time limits for bringing claims as a result of the extra delay which may be caused by the necessity to go through the statutory procedure.

Examples.

Pulling all this together, one can re-cap over the changes by considering their application to six hypothetical scenarios.

Example 1.

1. X earned £1,000 a week and was unfairly dismissed in circumstances where the standard DDP applies but his employer failed to follow that statutory procedure. Assume there was no contributory fault and that his actual loss as a result of the dismissal is £30,000.
2. This will be an automatically unfair dismissal (see new Section 98 A of the ERA)
3. The compensatory award at present would be £30,000 but (unless exceptional circumstances are shown) the Tribunal will in future be *obliged* to add at least 10% to the award (and up to 50% in its discretion) under section 31. Therefore, the compensatory award would be between £33,000 and £45,000

[This analysis assumes there is to be no Polkey reduction. Note – it would still be open to the employer at the remedy stage to argue that the X would still have been dismissed even if the statutory procedure had been followed - and that accordingly the compensatory award should be reduced under section 123 of the ERA. This Polkey reduction is done ***before*** *the uplift is applied. So, assume a 50% Polkey reduction the compensatory award would be £15,000 increased by between 10-50%]*

Example 2

1. Assume the facts are as before, but assume that X is 50% to blame for the dismissal.
2. As there has been a failure to follow the DDP, there is an automatic dismissal.
3. The compensatory award would be £30,000 at present reduced to £15,000 by operation of section 123 (6) of the ERA (contributory fault).
4. Under the new regime (assuming no exceptional circumstances to justify disapplying the uplift) – the compensatory award would be between £16,500 and £22,500 (i.e. take the £30,000 loss and apply the section 31 uplift – between 10 and 50% - and then halving the figure to apply the contributory fault).

Example 3

1. Assume the facts are as *per* the first example, except that X obtained more remunerative employment immediately following the dismissal. Therefore, no compensatory award.
2. Under the new regime, by a new section 120 (1A) inserted into the ERA, the *minimum* basic award would be 4 weeks pay (irrespective of length of service). Presumably the statutory maximum for a week's pay applies here (i.e. £250 per week). Therefore the minimum basic award would be £1,000 (*unless the Tribunal though this would cause injustice to employer)*

Example 4

1. X is dismissed in circumstances where the DDP applied.
2. The employer had a more extensive disciplinary procedure – which was not followed *but* the employer complied with the statutory DDP minimum procedure.
3. The case will be resolved under the new regime as it would be now, but on *liability* it will now be open to the employer to argue that X would have been dismissed in any event even if the more extensive procedure had been followed (reversal of Polkey rule)

Example 5

1. A brings a race or sex discrimination claim against his/her employer that is worth £10,000
2. Assume the SGP applies.
3. He/she starts the procedure (i.e. send a letter setting out the nature of the grievance) but fails to follow it up (say fails to attend a meeting).
4. The claim is not barred but (unless there are exceptional circumstances) the Tribunal is obliged to reduce the award by between 10% and 50% (by section 31 of the Act)

Example 6

1. As before, but A does not set out the complaint in writing before commencing Tribunal proceedings (i.e. does not start the Grievance Procedure) – or commences proceedings within 28 days of starting the grievance procedure.
2. By section 32 of the Act, the Tribunal cannot proceed with the claim if employee's breach is apparent to it or raised by employer.

MAIN CHANGES TO TRIBUNAL PROCEDURE

1. Of particular interest are powers to make changes to the rules on costs and pre-hearing reviews.

Costs

2. At present, the power to award costs in the Employment Tribunal is limited to an order against *a party* where that party is bringing or conducting proceedings which are misconceived or where the conduct of the parties or their representatives is vexatious, abusive, disruptive or otherwise unreasonable. The current procedural regulations do not give Tribunals a general power to award costs against a losing party, in the absence of these factors. There will be no change to the circumstances in which the Tribunal may award costs against such a party. Currently, however, there is no power to make a costs order *directly against a representative.* Nor is there a power to include within an award made under the "costs" jurisdiction a sum to reflect the party's preparation time.

3. The Act enables the procedural regulations to be amended to empower an Employment Tribunal (or the EAT) to make wasted costs orders against representatives (it is not envisaged that this will extend *to pro bono* organisations) – and/or order that the representative not recover all or part of his fees.

4. Provision is also made for:
   (a) a party to be able to recover in respect of their preparation time;
   (b) for the procedure in the EAT and ET to be aligned;
   (c) the reversal of the decision of the Court of Appeal in Kovacs v Queen Mary & Westfield College and the Royal Hospitals NHS Trust [2002] IRLR 414 – in which it was held that the Tribunal could not have regard to ability to pay when deciding how much to award under a costs order.

Pre-hearing review

5. At present, a Tribunal is able to hold a pre-hearing review and require an applicant to pay up to £500 by way of deposit as a precondition to the case continuing if it does not stand a reasonable prospect of succeeding. If the deposit is not paid, the case may then be struck out.

6. There is some debate as to whether the rules at present would enable the Tribunal to strike out a case which stood no realistic prospect of succeeding. The Act, therefore, empowers the Secretary of State to make regulations giving the Tribunal this power.

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AN OVERVIEW OF THE EMPLOYMENT ACT 2002

CHANGES TO THE LAW OF UNFAIR DISMISSAL

AND TRIBUNAL PROCEDURE

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