

THE DEATH OF THE DISPUTE RESOLUTION REGULATIONS & THE NEW ACAS CODE

1. THE PRESENT REGIME

1.1 The *Employment Act 2002 (Dispute Resolution) Regulations 2004*, SI 2004/752 ('the 2004 Regs'), enacted by Schedule 2, Part 3 of the *Employment Act 2002* ('the EA 2002'): in force since 1 October 2004

1.2 The ACAS *Code of Practice on Disciplinary and Grievance Procedures* ('the 2004 Code'): also in force since 1 October 2004

1.3 Characteristics of the present regime

1.3.1 Both the *2004 Regs* and the *2004 Code* apply to all enterprises, irrespective of employee numbers.

1.3.2 Disciplinary and dismissal procedures are mandatory (employer's failure to follow renders dismissals automatically unfair¹):

- (i) employer's letter to employee setting out alleged misconduct, employer's invitation to employee to discuss issue; formal meeting;
- (ii) employee informed of decision and right of appeal,
- (iii) if employee does appeal, employer must invite him to further meeting; employee informed of final decision.

¹ Section 98A, *Employment Rights Act 1996*

1.3.3 Mandatory grievance procedures (if not invoked by employee sending written grievance and waiting 28 days before sending in ET1, claim usually barred²):

- (i) employee writes down and sends to employer details of alleged grievance,
- (ii) employer's invitation to employee to discuss issue; formal meeting; employee informed of decision and right of appeal,
- (iii) if employee does appeal, employer must invite him to further meeting; employee informed of final decision

1.3.4 Tribunals empowered to increase/reduce awards dependent on extent of compliance with the procedures (by 10-50%)

2. REASONS FOR REPEAL OF THE 2004 REGS

2.1 Principal conclusions of the Gibbons Review, March 2007³:

- (a) Too complex for many (procedure vs merits);
- (b) Overly formal and bureaucratic to the extent of hampering realistic dispute resolution⁴;
“By the time things are in writing, it's probably too late to resolve them over a pint in the pub”;
- (c) Can unnecessarily add to parties' costs in cases incapable of settlement;

² Section 32, EA 2002

³ 'Better Dispute Resolution: a review of employment dispute resolution in Great Britain', Michael Gibbons, DTI, March 2007

⁴ *“Rather than encouraging early resolution, the procedures have led to the use of formal processes to deal with problems which could have been resolved informally. This means that problems escalate, taking up more management time. Employees find themselves engaged in unnecessarily formal and stressful processes, which can create an expectation that the dispute will end in a tribunal. The complexity of the procedures and the penalties for failing to follow them mean that both employers and employees have tended to seek external advice earlier.”*

2.2 Is it necessary to maintain a formal dispute resolution process?

2.2.1 The Gibbons Review was in favour of retaining a system providing clear guidance, with incentives to follow it. Both employers and employees benefit from a user-friendly system.

3. THE NEW REGIME

3.1 On 6 April 2009 the 2004 regs will be repealed and will be replaced by a new framework based on the provisions of the Employment Act 2008 (“the 2008 Act”).⁵ The 2008 Act also repeals sections 29 to 33 of and Schedules 2 to 4 to the EA 2002 and section 98A ERA.

3.2 A revised ACAS Code of Practice (“the new Code”) will come into effect on the same date. The final draft Code has been approved by the Secretary of State and is attached to this paper.

3.3 Mandatory disciplinary and dismissal procedures to be repealed

3.3.1 After April 2009 when employers fail to comply with the new Code, dismissals will no longer be deemed automatically unfair

3.3.2 The new Code is essentially the same as the 2004 Regs, but without being mandatory:

- (i) Disciplinary meeting should be held promptly upon ensuring employee notified of nature of the problem; no longer mandatory for employer to set out alleged misconduct in writing and ensure employee receives copy of the same (as with current regime as set out in Sched 2, Pt 1(1), EA 2002).

⁵ The 2008 Act received Royal Assent on 13 November 2008.

- (ii) At meeting the employee must be allowed to set out their case and answer any allegations that have been made.
- (iii) The new Code does not require a disciplinary warning (or even a dismissal) to be communicated in writing. These remain matters of good practice.

3.3.3 The new enforcement regime is based on compensation and costs. The 2008 Act introduces a new section 207A of the Trade Union and Labour Relations Act 1992, which allows for adjustment of awards:

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

A parallel provision provides for reduction of awards where the failure is by the employee.

3.4 Repeal of mandatory grievance procedures

3.4.1 The statutory bar on bringing proceedings where the grievance procedures have not been complied with (EA 2002, section 32) will be repealed.

3.4.2 The draft Code states as follows at paragraph 31: *“If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.”*

3.4.3 It follows that the following key requirements no longer apply:

3.4.3.1 The requirement for the employee to set out the grievance in writing and send the statement or a copy of it to the employer.

3.4.1.2 The requirement for the employee to wait 28 days after serving his formal written grievance before instituting tribunal proceedings.

3.5 Other changes

3.5.1 Will the new regime have any bite? Yes and no. The new Code provides a helpful summary:

A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code. This means that if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25%. Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the code they can reduce any award they have made by up to 25%.

3.5.2 *“Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when*

*deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code”.*⁶

3.5.3 Wording of the draft Code: more ‘should’, less ‘must’. But Tribunals are likely to ask an employer who fails to follow the Code to justify their actions.

3.5.4 Special cases

(a) References to whistleblowing/confidential informers which appeared in earlier drafts of the Code have been taken out. Nevertheless, guidance in *Linfood Cash & Carry Limited v Thompson* [1989] IRLR 235 (subject to the *Boys and Girls Welfare Society v Macdonald* [1996] IRLR 129) remains helpful.

(b) Employee convicted of a criminal offence

This is not in itself reason for disciplinary action

Paragraph 30 of the draft Code states: ‘*Consideration needs to be given to the effect of the charge or conviction on the employee’s suitability to do the job and their relationship with their employer, work colleagues and customers*’

(c) No special arrangements for Trade Union representatives, but advisable to contact the union (with the employee’s permission).

4. SIGNIFICANCE OF NEW REGIME FOR LITIGATORS

4.1 Transitional arrangements set out in SI 2008/3232. Somewhat complex but in the short term the old regime will survive in many cases.

⁶ Para 4, Introduction, *ibid*

4.2 The death of the 2004 Regs signifies a shift in power away from employers. Fewer claims knocked out “on a technicality”. Employers still at risk of adverse findings on fairness.

4.3 Tribunals will only be able alter compensation levels by 25%, and only when unreasonable failure to follow new regime

4.4 Likely effect on Claimants

4.4.1 Easier to bring claims

4.4.2 Easier to amend deficient claims

4.5 Likely effect on Respondents

4.5.1 Possibility that the claim form will be the first indication an employee is bringing proceedings against employer. Important to consider applying for costs sanctions and award reductions if so.

4.5.2 Potential for late amendments previously prohibited by the 2004 Regs

4.5.3 If in doubt, employers should stick to the requirements of the Code. Where it is possible to follow the old Code, that may well be the safest course.

4.5.4 No room for complacency. Continued need for disciplinary/dismissal/grievance procedures. Contractual obligation to deal with grievances (*WA Goold (Pearmak) Limited v McConnell* [1995] IRLR 516) as well as requirements of procedural fairness for dismissals remain.

4.5 Costs

4.6.1 The intention of the new rules is to save costs by avoiding claims being brought and by facilitating dispute resolution outside the tribunal system. It remains to be seen whether that will be successful. There will of course be a reduction in sterile satellite litigation relating to jurisdiction.

4.6.2 Respondents should be alert to the possibility of seeking costs where claimants and their representatives increase litigation costs by failing to cooperate with internal grievance and/or disciplinary procedures.

4.7 The future

4.7.1 The Gibbons Review goes further than advising the abolition of the 2004 Regulations. It advocates a complete overhaul of the tribunal claims process, introducing an automatic early conciliation/mediation stage, easier claims initiation (potentially accessed via helpline), hiving off simple money claims to be heard by single employment judges, increasing tribunals' powers to take account of value of parties' offers to settle, and no less than the total '*simplification of employment law*'.⁷

4.7.2 While this is undoubtedly a noble ambition, it seems unlikely that employment lawyers will become an endangered species any time soon. Nevertheless, it is to be hoped that litigation under the new Code will be more purposeful than some of that with which we have been occupied over the last 5 years.

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⁷ Paragraph 11, p11, Gibbons Review