

Dispute Resolution: from the frying pan into the fire?



Barry Clarke, a man who reads this stuff for fun, shows just why he is the lawyer everyone wants to talk to about the repeal of the little liked Statutory Dispute Resolution Procedures (SDRPs) a few months before they were to celebrate their fifth birthday.

What does it all mean Barry?

Introduction

We might be forgiven for thinking that the date of 6 April 2009 has heralded a return to a simpler way of life, back to the legal landscape as it was prior to the advent of the SDRPs on 1 October 2004. However, that would be a mistake. Quite apart from the fact that such a proposition is meaningless to anyone who started working in this area after October 2004 (which includes any employment lawyers now in their fifth year of post-qualification experience), what we have returned “to” is in fact different. We are still, for example, living with adjustments to compensation; and, to avoid such adjustments (or gain them, depending on your perspective), the parties still need to follow procedures: grievances, meetings and the like. Sound familiar?

Moreover, it might be said that 4½ years of statutory procedures have permanently changed the way in which employers and employees seek to resolve their disputes – and not for the better.

“inspiring awareness”

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There are three other reasons why we should hesitate before we discard all that we have learned about the operation of the SDRPs:

First, there will be a “throughput” period of at least a year as cases commenced under the old regime work their way through the system – indeed, for those that end up on appeal or require extensive case management, that time period may be even longer. So we can look forward to dealing with these issues well into 2010 and probably 2011. We will still have to analyse how the procedures should be interpreted and applied.

Secondly, the transitional provisions governing the move from one regime to another are not exactly straightforward. Counter-intuitively, claimants will still be presenting ET1 claim forms under the pre-April 2009 regime many months after the repeal of the SDRPs. Care will be needed to determine which regime applies, as parties seek to time their affairs so as to choose the regime that is most beneficial.

Thirdly, some of the many appellate decisions will have relevance that endures beyond the repeal of the SDRPs. An obvious example comes from those cases dealing with adjustments to compensation for non-compliance with the SDRPs; they will clearly be highly persuasive when it comes adjustments to compensation for non-compliance with the new ACAS code.

What is going and what is staying?

The Employment Act 2008 (EA 2008) came into force on 6 April 2009. For our purposes, the key provisions are as follows.

Section 1 EA 2008 has repealed Sections 29 to 33 (and Schedules 2 to 4) of the Employment Act 2002 (EA 2002), including the Employment Act 2002 (Dispute Resolution) Regulations 2004 (DR Regs). This has dismantled the whole edifice of the SDRPs. However, it does **not** repeal Section 38 EA 2002, which provides for the making of an award of two or four weeks’ pay in the event of an employer’s failure to give a statement of employment particulars; this provision remains.

Section 2 EA 2008 has repealed Section 98A of the Employment Rights Act 1996 (ERA), i.e. the concept of automatic unfair dismissal for failure to complete the DDP as well as the partial reversal of *Polkey*.

Section 3 EA 2008 has the following effect:

Section 3(2) EA 2008 has inserted a new Section 207A into the Trade Union and Labour Relations (Consolidation) Act 2008 (TULRCA), setting out the consequences of a party’s failure to comply with a “relevant Code of Practice”. This is a reference to the revised ACAS Code of

Practice on Discipline and Grievance Procedures (a longer supplementary guide has also been issued but is not the “relevant Code of Practice” for these purposes). The crucial provisions are at Sections 207A(2)-(3) TULRCA: they have the same structure as did Sections 31(2)-(3) EA 2002, setting out the circumstances in which a Tribunal may adjust an award upwards or downwards by no more than 25% (replacing the 10% to 50% adjustment parameters under the SDRPs).

Section 3(3) EA 2008 has inserted a short Schedule A2 into TULRCA, a pleasantly short read after the interminable Schedule A1 on trade union recognition. Its purpose is to list the Tribunal jurisdictions to which the adjustment provisions in Section 207A TULRCA apply.

Section 3(4) EA 2008 has amended Section 124A ERA, with the effect that the compensatory award for unfair dismissal will be adjusted under Section 207A TULRCA in the same way as it had been previously been adjusted under Section 31 EA. The basic award for unfair dismissal, as before, is not “adjustable”; there is no minimum four-week award.

Section 5 EA 2008 has amended Section 18 of the Employment Tribunals Act 1996, which sets out the conciliation powers of ACAS. In broad terms, while ACAS remains under a duty to conciliate once an ET1 claim form has been presented, it is no longer under a duty to conciliate in situations where a request is made for conciliation **before** an ET1 claim form is presented (some people are surprised to learn that such a duty even existed). In such scenarios, ACAS “may” (rather than “shall”) endeavour to promote a settlement: put another way, a duty to conciliate in these circumstances has been demoted to a power to do so.

For completeness, I should also mention the Employment Tribunals (Constitution and Rules of procedure) (Amendment) Regulations 2008, which also came into force on 6 April 2009. They made a number of consequential amendments to the Tribunal’s Rules of Procedure, by deleting those parts of the Rules that interconnected with the SDRPs, such as Rules 1(5), 1(6), 1(8), 3(6), etc, as well as Rules 22 to 24 on fixed period ACAS conciliation.

Those representing respondents should note a technical change to the way in which they should apply for an extension of time in which to present an ET3 response form. Such applications need no longer be made under Rule 11(4), but under a new Rule 4(4A). Both this new Rule, and Rule 11(4), are amended so as to empower an Employment Judge to reduce the 7-day time limit for other parties to object to an application. Where the 28-day time limit has been missed, the amended Rules make it mandatory for the Employment Judge to issue a default judgment (although there are exceptions where the Judge considers that he/she has insufficient information to issue a default judgment). Other amendments relate to the use of electronic

communications and increased clarity about the circumstances in which settled claims are dismissed.

Furthermore, there are now simpler ET1 and ET3 forms to use. They contain no questions about grievances!

The new ACAS Code of Practice

The new ACAS Code of Practice on Discipline & Grievance Procedures was finally approved by Parliament on 16 March 2009. The Daily Mail greeted the news, rather optimistically, with the headline "Rows won't have to end up at an employment tribunal".

The Code is the "relevant Code of Practice" for the purposes of the new Section 207A TULRCA and has replaced the previous Code on the same topic. We should not forget, of course, that it is also the relevant Code for the purposes of Section 207 TULRCA, the longstanding (but often overlooked) section providing that the Code, while itself not legally binding, is admissible in evidence before an Employment Tribunal and "shall" (i.e. must) be taken into account in determining any question arising in the proceedings to which it appears relevant. Section 207A TULRCA does not alter that position: a failure to comply with the Code will not, in and of itself, impose liability on a party.

However, in making clear that the Tribunal is empowered to adjust compensation by no more than 25% in the event of an unreasonable failure to comply with the Code, the new provision will plainly elevate the Code to greater prominence. The longstanding idea that the ACAS Code should be a feature of every Tribunal hearing may finally become a reality, and that is to be welcomed. That said, I suspect that, given the stated effect of Section 207A TULRCA, many parties will rely upon it more in the context of hearings on remedy. Certainly, when ACAS consulted on the draft Code, the focus of most lawyers' comments seemed to be upon the adjustment regime.

The thrust of Section 207A TULRCA is that an unreasonable failure to follow the Code will lead to an adjustment in compensation intended to penalise the party responsible for the failure to comply. Self-evidently, this issue only arises if a claim succeeds. If it does, it seems that the Tribunal will have to answer five questions:

- Is this a claim to which the Code applies?
- If so, has there been a failure to comply with it?
- If so, was that failure unreasonable?
- If so, is it just and equitable in all the circumstances for the Tribunal to adjust the award?

- If so, by how much (up to 25%) should the Tribunal adjust the award?

I shall take each in turn.

Does the Code apply?

On the face of it, this is the easiest question of all. By virtue of Section 207A(1), the Code applies to any claim brought by an employee under any of the jurisdictions listed in Schedule A2 TULRCA. Like the SDRPs, therefore, it applies only to members of the workforce who are, in law, employees. It does not apply to the self-employed or to those who are, in law, 'workers'. Applying the logic that has been used in cases such as *Odoemelam*, the ACAS Code cannot be used as the basis for seeking an adjustment in compensation against an individual respondent in a discrimination case. When a respondent has defended (say) an unfair dismissal a claim on the basis that a claimant is not an employee, but the Tribunal finds otherwise, in principle the Code will apply for the purposes of both Section 207 TULRCA (it will be admissible in evidence at the liability hearing) and Section 207A TULRCA (adjustments to compensation at the remedy hearing).

The list of jurisdictions in Schedule A2 covers the obvious candidates (unfair dismissal, detriments during employment, working time, all the strands of discrimination including equal pay, redundancy payments and minimum wage) and, like the SDRPs, omits some notable candidates (claims under Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and Section 80F ERA (requests for flexible working)).

The Code itself was amended during consultation with the effect that it applies neither to dismissals on grounds of redundancy (whereas the DDP applied to individual but not collective redundancies) nor to dismissals that arise on the non-renewal of a fixed term contract upon its expiry. It still does apply to the full range of conduct, capacity and SOSR dismissals.

There are still some unresolved issues. For example, does it apply where the Tribunal rejects an employer's contention that the dismissal was on grounds of redundancy or because of the expiry of a fixed term contract (i.e. they are sham reasons)? Also, what happens when the redundancy/expiry of a fixed term contract is not sham but overlaps with reasons that are covered by the Code? This might occur with a genuine redundancy situation where the employee's selection for redundancy is tainted by discrimination (e.g. it counted maternity-related absence under its selection criteria), or where an employer decides not to renew a fixed term contract because of the employee's misconduct. In such cases, it seems inconsistent that there should be no adjustment to an award.

It was originally thought that a failure to follow the DDP in relation to suspension without pay could result in an unlawful deductions claim together with the appropriate compensation uplift; see *Masterfoods v. Wilson* (para 65). However, in *A & B Travel Ltd* (para 7), a differently constituted EAT took the converse view, holding that “the fact that there has been a failure in relation to a distinct disciplinary step, namely suspension without pay, ought not to have any bearing on the question of whether the procedure has been completed in relation to the matter complained of, namely dismissal”. In contrast, the Code does not exclude the stages of a disciplinary process prior to dismissal. The effect, seemingly, is that employees may appeal every stage of a disciplinary process and an employer’s refusal to allow them to do so could lead to an argument over a possible adjustment to compensation, such as in a discrimination case.

Schedule A2 confirms that the Code applies to what it calls claims for “breach of employment contract and termination” under the 1994 Extension of Jurisdiction Order. This is notable for its effect upon remedy for an employee who is dismissed in breach of contract (i.e. without notice or payment in lieu of notice) but lacks the year of continuous service necessary to qualify for the right to claim unfair dismissal. If such an employee wins his case, it seems that he can seek an upward adjustment to his damages for his employer’s unreasonable failure to comply with the Code. If this is correct, it would clearly be an error to advise an employer that the Code can be ignored when dismissing those with less than one year’s service.

It is not immediately clear whether the grievance aspects of the Code apply to former employees. There are arguments both ways on this point. On the one hand, the Code is drafted in such as to suggest that grievances need to be brought only by those still in employment; certainly, there is no express mention of those whose employment has terminated. On the other hand, it might be said that the inclusion of breach of contract claims under the 1994 Extension of Jurisdiction Order indicates that the Code is intended apply to former employees – since such claims can only be presented to a Tribunal if they arise (or are outstanding) upon termination of employment.

Has there been a failure to comply with the Code?

This is a question of fact: the Tribunal must examine the content of the Code and compare it with the conduct of the party alleged to be in default. In most cases, this will be a straightforward exercise, and the breach will be apparent: no prior written grievance, no meeting, no right of appeal, and so on. As the Foreword to the Code says, it “sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances”.

However, not all cases are straightforward; we saw how Tribunals were initially inundated with technical arguments that the slightest breach of the

DDP rendered a dismissal automatically unfair. If that was the case with the SDRPs, how much more will it be true with the Code? This is not just because (at 45 paragraphs) the Code is longer, but also because some of its language is more aspirational. This is not a criticism: indeed, it is exactly what ACAS should be doing. But how, for example, will a Tribunal assess whether an employer or employee has acted “consistently” (paragraph 4)? These may seem like arid arguments, but what lawyer will resist making them when up to 25% of a high value claim is at stake? And what lawyer would risk not making them if he or she might otherwise be accused of negligently omitting a crucial argument about quantum?

Two of the more interesting aspects of the Code are as follows:

- While recognising that the Code is well written and easy for lay people to understand (and, therefore, light years ahead of the DR Regs), what will employers make of paragraph 31, by which employees should raise grievances formally “if it is not possible to resolve [them] informally”? Will we see respondents arguing that a successful claimant should face a reduction in compensation of up to 25% because he or she shunned informal attempts at resolution? I have heard some commentators make similar observations about the sentence in the Foreword to the Code providing that “employers and employees should always seek to resolve disciplinary and grievance issues in the workplace” (indeed, in the previous draft, it said that they should do “all that they can” to resolve such issues), but we should remember that the Foreword is not part of the Code itself.
- Another curious provision is contained in paragraph 12 of the Code. In the context of discussing what, in the language of the DDP, we might call a “Step 2 meeting”, it provides (with my emphasis) that the “employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses”. Call relevant witnesses? Since when has that been one of “basic requirements of fairness that will be applicable in most cases”? Case law around Section 98(4) ERA has long made clear that disciplinary meetings are not ordinarily quasi-judicial affairs in which witnesses are to be called and questioned. In a typical unfair dismissal case, the Tribunal is less interested in whether the employee was given an opportunity to “call witnesses” than it is in whether the decision-maker spoke to them (if relevant) and reasonably took account of what they said.

I am not saying that these arguments are necessarily meritorious. While it is possible to mount an argument that the ACAS Code shifts the parameters of the “range of reasonable responses” in a narrower way than case law permits, the point I am seeking to make is different. My point is that the retention of an adjustment regime based in part on aspirational wording will make the remedy stage of litigation more complex than it needs to be and, in

some ways, replicate the problems encountered with the SDRPs. Even if Tribunals dismiss such arguments, they will still have to spend time listening to them. To the list of mitigation, contributory fault and *Polkey* deductions, we can now add compliance with the ACAS Code.

Was that failure to comply unreasonable?

As stated above, it is not a failure to comply with the Code that, by itself, triggers consideration of an adjustment. Something more is required: it is only an unreasonable failure to comply with the Code that triggers such a consideration.

Personally, I find this concept rather odd. If the express purpose of Code is to define and delineate standards of reasonable behaviour, how can a failure to follow such standards ever be reasonable? It is counter-intuitive. Either something is reasonable or it is not. Yet Section 207A anticipates cases where a Tribunal will conclude that an adjustment to compensation is unavailable because, in effect, it was reasonable for an employer to act unreasonably! Would it not have been simpler to build into the Code examples of when normal standards of reasonableness could be relaxed (e.g. small employers, unforeseen economic circumstances)? Then Section 207A could have provided that a mere failure to comply with such a Code would have triggered consideration of an adjustment, without the need for an added layer of “unreasonableness”.

This root of this problem is that the new regime on dispute resolution has been structured in such a way that the parties are prompted to analyse the ACAS Code only in the context of quantum, not liability, because that is where it bites. Imagine a case where a claimant successfully claims unfair dismissal because the Tribunal was persuaded that the employer acted unreasonably for the purposes of Section 98(4) ERA. Let us say that the Tribunal accepted that the investigation fell outside the range of ways in which a reasonable employer would behave (see *Sainsbury's Supermarkets Ltd v. Hitt* [2003] IRLR 23). If, in the context of a remedy hearing, the Tribunal is persuaded that the failure to comply with the provisions of the ACAS Code dealing with disciplinary investigations (at paragraphs 5 to 8) was in fact reasonable, an obvious question arises: why was the dismissal unfair in the first place? This added requirement for reasonableness creates circularity and complexity.

Is it just and equitable to adjust the award?

Where there has been an unreasonable failure to comply with a provision of the ACAS Code, Section 207A provides that a Tribunal may make an adjustment if it considers it just and equitable to do so. This is similar to the way in which the predecessor provision in Section 31 EA operated; one can see how previous case law interpreting Section 31 EA will have ongoing

relevance beyond the repeal of the SDRPs. Unfortunately, with these cases, there has been something of a divergence of approach on the point between the EAT in Scotland and the EAT in England and Wales. In the new regime, one can see that this divergence might impact on both the fourth question (is it just and equitable to adjust the award?) and the fifth (what should the adjustment be?).

The EAT in England and Wales was reluctant to set down principles that fettered the discretion available to Tribunals under the old provision in Section 31 EA. In *CEX Ltd v. Mark Lewis*, for example, HHJ Burke QC held that the old provision gave Tribunals a “broad discretion” that “should not rightly be subject to attack on appeal”. The EAT in Scotland has taken a more interventionist approach; see *Aptuit (Edinburgh) Ltd v. Kennedy and McKindless Group v. McLaughlin*.

HHJ McMullen QC made some interesting comments about what he considered would constitute exceptional circumstances for a ‘zero’ uplift under Section 31 EA. This arose in the case of *Bottomley* (see paras 24 and 25 of the judgment) in the context of large-scale equal pay litigation, including the fact that the recipient of a grievance was a transferee in a TUPE scenario when all the main aspects of the litigation (including the grievances) had been directed at the transferor Council. One can see how a Tribunal might find this case persuasive if an analogous scenario arose under the new adjustment provision.

Whereas previously an adjustment arose only where there had been a failure to **complete** the applicable SDRP, under the new regime an adjustment issue will arise where there has been an unreasonable failure to **comply** with the ACAS Code. There is a difference, as the Court of Appeal’s decision in *Selvarajan v. Wilmot* made clear. Furthermore, the ACAS Code is more expansive, with the effect that (for example), an adjustment issue will arise in relation to an employer’s failure to allow an employee to be accompanied to a relevant meeting. At present, under Section 10 of the Employment Relations Act 1999, a Tribunal may award two weeks’ pay in respect of a breach of that right. I only pose the question: in a successful unfair dismissal case where a claimant was also refused a companion, why would a Tribunal consider it just and equitable to increase the compensatory award by 25% when Parliament has already attached a “value” of two weeks’ pay to a breach of that right?

What should the adjustment be?

The EAT in England & Wales has emphasised the broad discretion available to Tribunals under the old provision at Section 31 EA. Given that the wording in Section 207A TULRCA is almost identical, one can see that the following cases will have continuing relevance.

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Looking again at *CEX Ltd v. Mark Lewis*, HHJ Burke QC refused to interfere with an uplift of “only” 10% uplift in compensation payable to an employee. He noted that the Tribunal had been entitled to take into account the culpability of the defaulting party, such as whether the employer deliberately flouted statutory requirements or was merely ignorant of the law; rather curiously, he also suggested that (at the time of the employer’s decision to dismiss) the “comparative newness of the requirements” of the statutory procedures was “potentially relevant” (para 50).

Similarly, in *Metrobus Ltd v. Cook*, the EAT refused to interfere with an uplift of 40% where the employer had “blatantly” failed to comply with the obligation to send a Step 1 letter. It did not criticise the Tribunal’s formulation of the uplift provisions as “more penal than compensatory in nature” (para 31). In the *Davies* case (para 27), Burton J suggested that a maximum uplift would apply where there had been a “complete and deliberate breach of any procedures”¹.

In *Home Office v Khan & King*, the EAT upheld a Tribunal’s decision to award an uplift of 25%. Although the failure was “deliberate”, it was not “contumelious” or “irrational”: the employer had taken the view, albeit wrongly, that it was not appropriate to proceed with a grievance procedure while Tribunal proceedings were pending. It was also potentially relevant that the procedural failure in question did not in fact lead to any adverse consequences. The EAT suggested that it would be good practice for Tribunals to set out briefly those factors that they have taken into account in setting the level of the adjustment.

In the *Butler* case, the EAT refused a request to set out general guidance on the adjustment provisions. Insofar as compensation was concerned, the employee appealed a refusal to award a maximum uplift of 50% (the Tribunal uplifted by “only” 30% in the case of a wholesale but not deliberate breach). In the words of HHJ McMullen QC (at paras 33 and 34):

In our judgment, that seriously misses the purpose and wording of the relevant regulations. It will be recalled that the regulations provide a discretion. This is the reason for the use of the word “may”. The range is actually between 0 per cent and 50 per cent, although anything less than 10 per cent must be exceptional. On a scale of 0 to 50 the Tribunal has placed this case at 30, therefore well inside the top zone. The matters to be considered are unlimited. The Tribunal must do what it considers just and equitable, and what must be considered are all the circumstances.

¹ The case of *Davies v. Farnborough College of Technology* is notable also for the EAT’s erroneous application of a 25% uplift to a basic award in an unfair dismissal case; any such uplift should, of course, be limited to the compensatory award only – see Section 124A ERA. That will continue to be the case for Section 207A TULRCA.

In the *Slingsby* case, HHJ McMullen QC categorised an uplift of 50% as “the worst case that would come before a Tribunal” (para 58). It would be logical to categorise an uplift of 25% under Section 207A TULRCA in the same way.

In *Abbey National plc & Hopkins v. Chagger*, the EAT held that it was legitimate for a Tribunal to take into account the overall size of an award when deciding the amount of an uplift. In this case, the “fine” for failure to observe the statutory DDP meant would, on the claimant’s case (and given the sheer size of his award for an unfair and discriminatory dismissal), have resulted in additional compensation of £300,000. The EAT held that the Tribunal “was fully entitled to regard that as wholly disproportionate to the offence, even if it was right to regard the failure as ‘substantial’” (para 132). Perhaps the reverse argument would apply: that larger adjustments are permissible where the award is smaller so as to prevent the “fine” on the employer being seen as inconsequential. Again, there is no reason to suppose that Section 207A TULRCA would involve a different approach.

More controversially, the EAT in Scotland has taken a more interventionist approach. In *Aptuit (Edinburgh) Ltd v. Kennedy*, it overturned a Tribunal’s uplift of 40%, which had been set on the basis that (a) the respondent was a large employer; (b) there had been a general lack of consultation; and, (c) the employee had been treated in a ‘shoddy’ manner. The EAT stated that these were all irrelevant factors because, in calculating the uplift, Tribunals should only have regard to the failure to follow the statutory procedure (para 47). However, with respect, this decision is questionable: such a limitation is not on the face of the statute, which leaves the level of the uplift entirely to the Tribunal’s discretion.

Another controversial decision from the Scottish EAT is *McKindless Group v. McLaughlin*. The employer admitted liability under Section 98A ERA and defended only on remedy. The Tribunal awarded a 50% uplift. The EAT substituted a 10% uplift. It stated that a Tribunal cannot award more than a 10% uplift in the absence of evidence on the reason(s) for breach of the DDP (para 13) and that it is not entitled to take into account the way in which the employer has subsequently conducted the litigation (para 26). However, this could lead to the odd situation whereby an employer who deliberately flouts the DDPs and then takes no part in the proceedings could not be subjected to more than a 10% uplift whereas a well-meaning but ignorant employer who tries to explain his error could be subject to a greater award. It remains to be seen whether such arguments will be run under the new adjustment provision in Section 207A TULRCA.

As far as I know, there is also an unanswered question about the extent to which an uplift in compensation (under either Section 31 EA or Section 207A TULRCA) is subject to deductions for tax or whether, in a discrimination case, it attracts interest? If I might venture an opinion, I would suggest the answer

is no (not subject to tax) and yes (it attracts interest), but I have seen no authority on the point.

The new ACAS Guide

In addition to the Code of Practice, ACAS has produced a supplemental “Guide” on “discipline and grievances at work”. At the risk of stating the obvious, the Guide itself is not part of the Code. It does not, therefore, form any part of the admissibility regime in Section 207 TULRCA or the adjustment regime in Section 207A TULRCA; both the Code and the Guide make this clear. It is a very lengthy document (74 pages) but deserves to be read as one can see that Tribunals may look to the Guide to assist them in interpreting aspects of the Code. It is worth noting the Guide’s positive comments about independent mediation, particularly as a way of resolving grievances (see pages 6 to 7).

Transitional provisions

In its response to the secondary consultation exercise, published on 16 December 2008, the Government showed that it had taken on board some criticisms of its proposed transitional arrangements, particularly with regard to the DDP (where it had originally proposed that the DDP should continue to apply to dismissals after 6 April 2009 where the employer had “contemplated” the dismissal prior to 6 April 2009). The final transitional provisions are set out in the Employment Act 2008 (Commencement No 1, Transitional Provisions and Savings) Order 2008 (SI 2008/3232). I shall look at the contents of the Transitional Order in relation to both the GP and the DDP. There is a page on the BERR website dealing with the transitional provisions: it sets out several examples of cases and explains whether they fall under the pre- or post-6 April 2009 regime².

Grievances

The challenge for the drafters was to identify the appropriate “trigger date” for the application of the new regime. The Order provides, in essence, that the statutory GPs do not apply after 6 April 2009 unless either:

- The matter complained about happened entirely prior to 6 April 2009; or

² http://www.berr.gov.uk/whatwedo/employment/Resolving_disputes/disputes_after_6_april_2009. However, as I explain below, some common scenarios are left out!

- The matter complained about is ongoing through the date of 6 April 2009 and the employee either initiates a statutory grievance or presents an ET1 claim form prior to 5 July 2009 if the relevant time limit is three months (as it is in most cases) or prior to 5 October 2009 if the relevant time limit is six months (subject to my comment below about Section 238 TULRCA, this means claims in respect of equal pay and redundancy payments).

In the context of grievances, the Order also refers to Section 238 TULRCA, namely dismissal of those taking part in unofficial industrial action. As the statutory GPs do not apply to dismissals, it seems odd that the Order refers to such claims at all. My guess is that it is because (alongside equal pay and redundancy payments) it is the only other statutory employment claim with a six-month time limit (see Section 239(2) TULRCA). It is feasible in theory that a claimant might argue that he/she has been constructively dismissed for taking part in industrial action. Although such a claim might sound conceptually odd, if it were to arise it is correct that there would be a cut-off date for presenting a grievance of 5 October 2009 and not 5 July 2009.

The most obvious difficulties will arise in cases where claimants rely on cumulative breaches of the implied term of mutual trust and confidence (on which to base a constructive dismissal claim) or continuing acts of discrimination, where they start before 6 April 2009 but continue through and beyond that date. The examples given on the BERR website show what I imagine to be the Government's intention, namely that, in those cases (i.e. the majority) with a three-month time limit, the ultimate cut-off date for grievances is 5 July 2009 and the ultimate cut-off date for presenting ET1 claim forms based on those grievances is 5 October 2009. That is likely to be true in most cases. However, there are two realistic scenarios where a claimant might present an ET1 claim form significantly after those cut-off dates but nonetheless still be covered by the old regime.

The first scenario arises because of the EAT's decision in *Smith v. Network Rail Infrastructure*. In that case, the EAT confirmed that an employee submitting a grievance relating to a continuing discriminatory act is not required to serve (and to keep serving) a further grievance in respect of the same continuing act. This is because it a complaint that looks forward as well as back. In *Weare v. HBOS*, Elias P subsequently elevated this to the status of a "doctrine".

Now, consider a case where (a) a continuing act of discrimination straddles the transition date, (b) the claimant has put in a grievance in relation to that continuing act before 6 April 2009 and (c) the act continues until, say, 31 December 2009. Applying the *Smith* doctrine, the original grievance would be extant to cover that continuing act, with the apparent effect that a claimant would have until 30 June 2010 (i.e. an extended time limit of six months) to

present an ET1 claim form under the old regime³. Indeed, it is not uncommon for claimants to allege that acts of discrimination continue for periods much longer than this!

It might be said in response that grievances lodged before 6 April 2009 are unlikely to be extant to cover grievances continuing for such a long period afterwards and, indeed, that might be a basis for persuading a Tribunal that the new regime should apply. Yet, in the *Canary Wharf* case (at para 19), Elias P confirmed that, in principle, there is no maximum time period after the submission of a written grievance in which an ET1 claim form should be presented. Instead, the correct approach is to ask whether it can properly be inferred that the employee no longer wishes to have the grievance determined (perhaps because he/she has not pursued it or because it was dealt with satisfactorily). Only in that case would a fresh grievance be required; otherwise, the original grievance remains extant.

The second scenario arises in constructive dismissal cases because of the EAT's decision *Step In Time v. Fox & Hunter*. It has been established that, where a grievance letter has been sent prior to resignation, there is no need for a further Step 1 grievance specifically alleging constructive dismissal after the resignation takes effect. As Elias P put it in the *Step in Time* case, "the employee's resignation is not part of his grievance, although it may demonstrate how significant he considers the grievance to be. His grievance relates to the conduct of the employer that caused him to resign" (para 30).

Now, consider a case where (a) a number of connected issues, over time, cumulatively breach the implied term of mutual trust and confidence, (b) the claimant puts in a grievance in relation to those matters before 6 April 2009 and (c) the employee resigns on, say, 31 December 2009 following a 'last straw' (which need not, in and of itself, be a repudiatory breach; it might be the employer's refusal to uphold an appeal against the original decision to dismiss the grievance). Applying *Step In Time*, the employee's original grievance would be extant (in relation to the conduct causing the employee to resign) even though the resignation took place some time afterwards. The apparent effect, again, is that a claimant in this scenario would have until 30 June 2010 (i.e. an extended time limit of six months) to present an ET1 claim form under the old regime.

These two scenarios, which I think are realistic, show that it is possible to see claims being presented under the old regime well into 2010, and certainly far longer than a cursory reading of the Transitional Order might suggest. And these scenarios carry with them additional complications. For example, in a

³ At the time of writing, the example on the BERR website closest to this one is "Miss F" at number 6, which goes as follows: "Employer takes action on 10 January 2009 which continues until 9 January 2010. Miss F submits a written grievance on 10 January 2010 and makes an ET 1 claim – **new regime** applies as although Miss G [*sic*] may have had grounds for a grievance before 6 April 2009, the written grievance has been made (or ET1 presented) after 4 July 2009". My point relates to what would happen if Miss F had submitted her grievance before 6 April 2009.

“continuing act” discrimination case, will the “*Smith* doctrine” truly apply? Practitioners and Tribunals are well used to cases where a claimant alleges a continuing act but, upon closer inspection, the component parts of that act are severable: some would then be covered by the pre-April 2009 regime and others by the post-April 2009 regime.

My prediction is that these issues will not come before Tribunals as a result of careful decisions on strategy taken by those advising claimants. Instead, I think that they will arise as a result of either (a) respondents seeking to argue that Tribunals lack jurisdiction to hear claims brought under the new regime (on the basis that, analysed properly, they are covered by the old regime and should have been, but were not, preceded by a Step 1 written grievance) or (b) claimants missing time limits under the new regime and seeking to argue that their written grievance entitled them to a three-month extension of time under the old regime. Much scope for further litigation!

Dismissals

The position regarding dismissals is, thankfully, simpler. The Government has abandoned its original intention that the “trigger event” should be when the employer has first “contemplated” taking disciplinary action. The thrust of the 2008 Order is that the statutory DDPs will only continue to apply after 6 April 2009 where the employer has disciplined or dismissed the employee prior to 6 April 2009 or has sent a Step 1 letter or held a Step 2 meeting prior to 6 April 2009. Clearly, a well-advised employer can conduct its affairs in such a way as to determine the regime under which it would prefer the fairness of that dismissal to be judged (with significant differences attaching to the application of the Polkey principle or the adjustment to be calculated). This might be called “regime shopping”.