These notes refer to the Employment Act 2002 (c.22) which received Royal Assent on 8 July 2002

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: Dispute Resolution Etc.

Statutory Procedures

82. Around 90% of larger employers have disciplinary and grievance procedures in place. Most are written and included directly or indirectly in employees' contracts. Under a disciplinary procedure, an employer can complain to an employee about his conduct or performance. Sometimes, such procedures are termed "dismissal procedures" where they deal with complaints or issues that can lead to the dismissal of an employee. Grievance procedures operate in the opposite direction and deal with formal complaints initiated by an employee against his employer.

83. Under current law, employment tribunals consider the existence and use of disciplinary procedures in unfair dismissal cases. A failure by an employer to use procedures appropriately can result in a determination by a tribunal that a dismissal was unfair. Tribunals must also take account of the ACAS Code of Practice on Discipline and Grievance Procedures and any internal procedures the employer may have, when determining the reasonableness or otherwise of the employer's decision to dismiss. The use of procedures can also affect the size of an award an employee may receive when unfairly dismissed. Under section 127A of the Employment Rights Act 1996, if a dismissal is found to be unfair a tribunal has the power to make a supplementary award of up to two weeks' pay where the employer prevented the employee from appealing against dismissal under the employer's procedure. Conversely, where an employee does not utilise the employer's appeal procedure the tribunal has the power to reduce any award by up to two weeks' pay.

84. Grievance procedures have no equivalent role under current law and employment tribunals do not generally take their use into account in determining complaints under their various jurisdictions. However, under section 10 of the Employment Relations Act 1999, a worker is entitled to be accompanied by a fellow worker or a trade union official at hearings held under a grievance procedure, provided the grievance is non-trivial in nature. Section 10 also provides for a similar right to be accompanied at hearings during disciplinary procedures.

85. Section 29-34 will bring in:

- Provisions setting out statutory dismissal and disciplinary procedures (DDPs) and statutory grievance procedures (GPs).
- Powers to make these statutory procedures an implied term of all contracts of employment.
- Provisions to enable tribunals to vary compensatory awards by up to 50% where the employer or the applicant has failed to use the minimum statutory procedures. The provisions contain powers enabling the Secretary of State to specify by regulation

how the statutory procedures will apply for these purposes. These provisions will in effect replace section 127A of the 1996 Act, which will be repealed.

- Provisions preventing certain categories of complaint from being presented to tribunals until Step 1 of the grievance procedures has been completed and at least 28 days have elapsed thereafter.

- Powers to extend, and to enable employment tribunals to extend, the time limits within which claims need to be made, to allow the relevant statutory procedures to be completed.

- Provisions which will make it unfair for employers to dismiss an employee without meeting their obligations under the relevant DDP. They will also ensure that tribunals disregard any failures by an employer to take other procedural actions outside the framework of the statutory procedure, if taking such additional procedural actions would have had no effect on the decision to dismiss.

- The affirmative resolution procedure applies to the making of all regulations under these sections.

86. A large proportion of complaints to employment tribunals involve employers without any internal disputes procedures. Many occur where employers or applicants have failed to use whatever procedures exist. Litigation to resolve employment disputes is costly and can often weaken employment relations and the employability of applicant workers. These provisions aim to encourage parties to avoid litigation by resolving differences through the proper use of internal procedures. They will, in effect, require all employers to have minimum procedures and give incentives to both employers and employees to use them.

- Section 29 and Schedule 2 - *Schedule 2* specifies the statutory DDP and GP procedures. Under both types of procedures, there is a 3 step standard procedure involving meetings to consider complaints and appeal processes. The Schedule also specifies a short modified version of the DDP and the GP involving just two written steps. Section 29 introduces the Schedule and contains provisions enabling the Secretary of State to amend these statutory procedures by order, following consultations with ACAS.

- Section 30 makes it an implied term of every contract of employment between an employer and an employee that a statutory procedure is to apply in circumstances specified by the Secretary of State in regulations. The section prevents employers and employees from contracting out of this implied term.

- Section 31 and Schedule 3 - Section 31 contains provisions requiring employment tribunals to vary compensatory awards for failures to use the statutory procedures before applications are made to employment tribunals. Unless there are exceptional circumstances, the variation must range between 10% and 50% of the award. However, in exceptional circumstances where a variation on that scale would be unjust or inequitable, tribunals may vary the award by less than 10% or they may decide to make no variation at all. Where an award falls to be adjusted under this section and section 38 the adjustment under this section is to made first. *Schedule 3* lists the jurisdictions covered by the section. Together, the listed jurisdictions cover the overwhelming majority of tribunal claims. Section 31 also gives powers to the Secretary of State to add or remove jurisdictions from the list. The section also gives the Secretary of State powers to make provision as to how the statutory procedures will apply for these purposes. These powers enable the Secretary of State in particular to specify circumstances where an employee or an employer is to be treated as having complied with a statutory procedure, even though none or only some of the required actions have been taken. In other words, the regulations could provide for exemptions from some of the requirements of the statutory procedures in particular circumstances.

- Section 32 contains provisions preventing certain categories of complaint from being presented to tribunals until Step 1 of the grievance procedures has been completed and at least 28 days have elapsed thereafter. The section also gives the Secretary of State powers to make provision about the application of the grievance procedure and what constitutes compliance.

- Section 33 gives the Secretary of State the power to make regulations about the time limits for beginning certain proceedings in an employment tribunal. In particular, regulations may cover extending the time for beginning proceedings, the exercising of discretion to extend the time for the beginning of proceedings and treating proceedings begun out of time as having been begun within time. The purpose of the powers is to allow time for the relevant statutory procedure to be completed before a complaint has to be presented to a tribunal.

- Section 34 - Currently, if an ex-employee complains to a tribunal that he has been unfairly dismissed, then the former employer needs to meet two tests in order to show that the dismissal was fair. First, he must show that the reason for the dismissal was one of the five reasons, which count as potentially fair reasons for dismissal (as set out in sections 98(1) and (2) of the Employment Rights Act 1996). Second, the dismissal itself must be reasonable in the circumstances. This second point has given rise to a large amount of complex and sometimes controversial case law around the question of whether or not the employer has to have followed internal disciplinary procedures in order to establish reasonableness. This culminated in a House of Lords decision (Polkey vs A E Dayton Services Ltd, 1988) reversing earlier case law which said, in effect, that if an employer failed to follow appropriate disciplinary procedures before dismissal, then he generally cannot justify this on the basis that it would have made no difference to his decision to dismiss if that procedure had been followed. It has been argued that this judgment, 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 the dismissal.

- The Government consulted in the 'Routes to Resolution' document and in its reply to the consultation, the Government confirmed that in the light of representations it had received, it intended 'to act to ensure that tribunals disregard procedural mistakes, beyond the statutory minimum procedures, in unfair dismissal cases, if following full procedures would have made no difference to the outcome.'

- Section 34 achieves this by inserting a new Section 98A into the Employment Rights Act 1996. The new section contains provisions that oblige tribunals to disregard failures by employers to take procedural actions outside the framework of the relevant DDP, provided that following such additional procedural actions would have had no effect on the decision to dismiss. The new section would, however, make it unfair for an employer to dismiss an employee without meeting their obligations under the relevant DDP, and provides that an employee will generally receive a minimum of four weeks pay as compensation where they are found to have been unfairly dismissed and the DDP has not been complied with.