These notes refer to the Employment Act 2008 (c.24)
which received Royal Assent on 13 November 2008

EMPLOYMENT ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Dispute resolution

Section 1: Statutory dispute resolution procedures

13. EA 2002 provides, in sections 29 to 33 and Schedules 2 to 4, for statutory workplace dispute resolution procedures (referred to in these notes as "the Statutory procedures").

14. The Statutory procedures came into force in October 2004 and introduced mandatory "three step processes" to be followed in the workplace to handle disciplinary and dismissal matters raised by an employer, and grievances raised by an employee. These processes each require written notification of the issue to the other side, a meeting between the two sides and (if appropriate) an appeal. Additionally, where the employer or the employee respectively fails to use the minimum Statutory procedures, section 31 of EA 2002 requires a tribunal to increase or decrease any award.

15. When the procedures were introduced, the Government undertook to review their operation and impact after two years. The independent Gibbons Review *["A Review of Employment Dispute Resolution in Great Britain", DTI March 2007 URN 07/755]* concluded that the Statutory procedures, whilst right in principle, have as a result of their mandatory nature led to unforeseen consequences. In particular, they have tended to lead to disputes becoming formalised, and lawyers getting involved, at an earlier stage than had previously been the case. Following a full public consultation *["Resolving Disputes in the Workplace", DTI March 2007 URN 07/734]*, the Government has decided to repeal the Statutory procedures.

16. Section 1 therefore repeals sections 29 to 33 and Schedules 2 to 4 to EA 2002, thus removing the Statutory procedures in their entirety.

Section 2: Procedural fairness

17. Prior to 2004, the handling of breaches of procedure in unfair dismissal cases was based on case law, and in particular the House of Lords judgment in *Polkey v A E Dayton Services Ltd* [1988] AC 344, which provided that a dismissal could be unfair purely on procedural grounds, but that in those circumstances the tribunal should reduce or eliminate the compensation payable (other than the basic award) to reflect the likelihood (if any) that the dismissal would have gone ahead anyway if the correct procedures had been followed. At the same time as the Statutory procedures were introduced in 2004, a new section 98A was inserted into ERA 1996. This section provides that a dismissal where an employer does not complete the Statutory procedures is automatically unfair. It also provides that a tribunal may disregard any failure by the employer to comply with other (e.g. workplace based) procedures in respect of the dismissal, if following such other procedures would have had no effect on the decision to dismiss.

18. Following the public consultation, the Government has decided to repeal section 98A of ERA 1996 in its entirety, so as to revert to the situation which applied previously based on the *Polkey* line of cases.

Section 3: Non-compliance with statutory Codes of Practice

19. As noted in paragraph 14, section 31 of EA 2002 requires a tribunal to increase or decrease any award where an employer or employee fails to follow the Statutory procedures. Section 31 of EA 2002 is repealed by section 1 of this Act and section 3 provides for an alternative mechanism to encourage compliance with a relevant Code of Practice which relates exclusively or primarily to procedure for the resolution of disputes issued under the power described below.

20. Under Part IV, chapter 3 of TULRCA 1992, the Secretary of State and Acas may issue Codes of Practice subject to Parliamentary approval ("statutory codes"). Section 207 of TULRCA 1992 provides that a statutory code, although not legally binding, is admissible in evidence and can be taken into account by the employment tribunal.

21. In order to provide an incentive to follow recommended practice, section 3 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution, by introducing a new section 207A and Schedule A2 to TULRCA 1992. The relevant Code of Practice is one which relates exclusively or primarily to procedure for the resolution of disputes. Of the existing six codes issued under TULRCA, such a definition only applies to the Acas Code of Practice on disciplinary and grievance procedures, which Acas is substantially revising for reissue at the time the Act comes into force.

22. Subsection (2) of new section 207A provides that the employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the relevant Code of Practice.

23. Subsection (3) of new section 207A provides that the employment tribunal may, if it considers it just and equitable, decrease any award to an employee by no more than 25% if it appears to the tribunal that the employee has unreasonably failed to comply with the relevant Code of Practice.

24. Subsection (5) of new section 207A provides that, where an award is adjusted under new section 207A and also under section 38 of EA 2002 (which provides that awards for claims under specified jurisdictions must be adjusted where it transpires during those proceedings that the employer has failed to give the statutory statement of employment particulars) the adjustment under new section 207A is to be made first.

25. New Schedule A2 lists the jurisdictions covered by this section. Together, the listed jurisdictions cover the overwhelming majority of tribunal claims. Subsection (6) of new section 207A confers power on the Secretary of State to add or remove jurisdictions from the list.

Section 4: Determination of proceedings without hearing

26. Section 7(3A) of ETA 1996 provides that employment tribunals may be authorised to decide cases without any hearing. Although this wide power was inserted into ETA 1996 in 2002, it has not been used. All cases in the employment tribunal are currently decided at a hearing before a full tribunal panel or a chairman sitting alone.

27. Section 4 inserts a new section 7(3AA) and 7(3AB) into the ETA 1996 to specify that employment tribunal procedure for determinations without hearing must ensure that all parties to the proceedings consent in writing to the process. The section also ensures that tribunals may continue to issue default judgments without a hearing, and that the consent of parties is not required in these circumstances.

Section 5: Conciliation before bringing of proceedings

28. Section 5 inserts amendments to section 18 of ETA 1996, which provides for the circumstances in which Acas is obliged, or has the power, to offer conciliation.

29. Section 18(3) of ETA 1996 applies to conciliation in situations where a person claims he could bring tribunal proceedings, but has not yet done so. It provides that where either the person who might bring proceedings, or the employer against whom proceedings might be brought, has requested conciliation, the Acas conciliation officer has a duty to attempt to conciliate a solution to the dispute (where both parties have made the request), or (if only one party has made the request) to do so where he considers there is a reasonable prospect of success. *Subsection (2)* amends section 18(3) to replace this obligation with a discretionary power to conciliate in a pre-tribunal dispute without requiring the Acas officer to justify the reasons for his decision whether or not to offer conciliation. The intention of the amendment is to enable Acas to prioritise cases where demand for conciliation exceeds resources available for conciliation and to relieve Acas of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success.

30. Section 18(5) of ETA 1996 provides that, where a person claims that an unfair dismissal complaint under section 111 of ERA 1996 could be, but has not yet been, made, the Acas officer must act as if that claim had been made and, as provided for in section 18(4) of ERA 1996, as part of the conciliation exercise, attempt to secure reinstatement or reengagement (or additional compensation in lieu of such) for the dismissed employee. *Subsection (3)* repeals that duty and substitutes a discretionary power to seek such reinstatement or reengagement in pre-tribunal disputes.

Section 6: Conciliation after bringing of proceedings

31. Section 18(2A) of ETA 1996 requires that, where employment tribunal rules provide for the postponement of employment tribunal hearings for a fixed period, to allow an opportunity for conciliation and settlement, Acas's duty to conciliate continues during that postponement but then becomes a discretionary power.

32. Section 19(2) of ETA 1996 requires additionally that, where employment tribunal rules provide as set out in section 18(2A), those rules must also provide that the parties be notified of the possibility that conciliation services may be withdrawn after expiry of the postponement.

33. The Gibbons Review of the Statutory procedures, confirmed by the responses to the government consultation, concluded that disputes were not generally being settled earlier, despite the parties' knowledge that after the expiry of the fixed conciliation period Acas would not be required to offer assistance in reaching a settlement.

34. Section 6 repeals section 18(2A) and 19(2) of ETA 1996, with the effect that Acas's duty to conciliate in employment tribunal cases subsists throughout the proceedings until the tribunal delivers a judgment.

Section 7: Compensation for financial loss

35. Section 7 amends ERA 1996 so as to give employment tribunals the power to order employers to compensate workers for any financial loss sustained as a result of unlawful deduction from wages or payments made to the employer in contravention of sections 15 and 21(1) of ERA 1996, or non-payment of redundancy awards.

Unlawful deduction from or unauthorised payment of wages

36. Sections 13(1) and 15(1) of ERA 1996 provide that an employer may not make unauthorised deductions from a worker's wages and sections 18(1) and 21(1) of ERA 1996 provide for limits to authorised deductions. Where any of these provisions are

contravened, a worker has a right to remedy by way of complaint to an employment tribunal under section 23(1) of ERA 1996.

37. Section 24 of ERA 1996 provides that, where an employment tribunal finds a complaint made under section 23(1) to be well founded, it will make a declaration to that effect and order the employer to pay or as the case may be repay the worker the amount of the deduction or payment.

38. The remedies available in sections 23 and 24 of ERA 1996 do not, however, extend to compensation for losses arising out of the non-payment or unauthorised deduction or payment, for example additional bank charges or interest charges. It is possible for a separate claim for such losses to be made by workers who are no longer employed by the defaulting employer, but only in the county court as part of an action for breach of contract by means of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994[1] or its equivalent in Scotland[2].

39. Section 7 inserts a new provision into ERA 1996 (new section 24(2)) so as to empower employment tribunals to order an employer to make, in addition to the payment (or repayment) of the amount of the unauthorised deduction or payment, a compensatory payment to reflect any financial loss suffered by the worker as a result of the employer's default. The tribunal would calculate any such amount so as to be appropriate in all the circumstances. This is intended to enable workers to be fully compensated for their losses, and simplify the process of recovery for those whose employment relationship has ended by removing the need to make a separate county court claim.

Non-payment of redundancy payments

40. Section 163 of ERA 1996 provides that any questions relating to the right of an employee to a redundancy payment or the amount of the redundancy payment shall be referred to and determined by an employment tribunal.

41. Section 7 inserts a new subsection (5) to section 163 of ERA 1996 which provides that, where an employment tribunal determines that an employee has a right to a redundancy payment, the tribunal can order that an additional payment be made to compensate the worker for any financial loss attributable to the non-payment of the redundancy payment.

1 (SI 1994/1623)
2 (SI 1994/1624)