DTI Consultation on Resolving Disputes in the Workplace:

Supplementary review of options for the law relating to procedural fairness in unfair dismissal

Introduction

The Dispute Resolution Review consultation document[1] notes (in paragraphs 2.13-2.17) that the proposed repeal of the statutory dispute resolution procedures[2] would affect the current statutory provisions on procedural fairness in unfair dismissal. The consultation outlines the issue and invites views on two options:

- to revert to the pre-2004 position; or
- to review the law relating to procedural fairness in unfair dismissal in order to assess whether it should be restated entirely.

Responses to the consultation so far are running significantly in favour of review, though the supporting comments suggest that few respondents have a settled view of what the outcome should be. The Government has therefore decided to move directly to the option of a fuller review, in order to ensure that it is completed in parallel with the main consultation. Responses to this review document are therefore sought by 20 June 2007.

Background

This review should be read in conjunction with the main consultation document, and only addresses the procedural fairness aspects of unfair dismissal.

The early position on this (set in *British Labour Pump v Byrne*[3]) was the so-called "no difference" rule, which established that, where there was a procedural irregularity in an otherwise fair dismissal but it could be shown that carrying out the proper procedure would have made no difference to the outcome, then the dismissal was fair.

This position was overturned by the House of Lords in the leading case in the area, *Polkey v A E Dayton Services*[4]. In this case the House of Lords found

[1] "Resolving Disputes in the Workplace – a consultation" published March 2007 www.dti.gov.uk/files/file38553.pdf
[2] The Employment Act 2002 (Dispute Resolution) Regulations 2004
[3] British Labour Pump Co Ltd v Byrne (1979, ICR 347)
[4] Polkey v AE Dayton Services (1987, IRLR 503)

that procedural failings would render a dismissal unfair except in certain exceptional circumstances. However, the decision also provided that the compensation awarded could be reduced, or eliminated entirely, to reflect the likelihood that the claimant would have been dismissed anyway even if the correct procedures had been followed. This allows the tribunal to take a graduated approach to compensation based on the impact of the procedural failings on the claimant. This is most likely to be done by estimating the likelihood that the claimant would have been dismissed anyway.

Fresh statutory provisions on procedural fairness in relation to unfair dismissal (new section 98A of the Employment Rights Act 1996) were introduced by the Employment Act 2002 alongside the new dispute resolution procedures which came into force in 2004. Section 98A(1) and (3) provide that a dismissal is automatically unfair if the new procedures are not followed.

Section 98A(2) makes a separate and additional change to the law: it provides that dismissal following a failure to follow *other* procedural steps will not affect the fairness of the dismissal, if the employer can show that he would still have dismissed even if he had followed those steps correctly. In other words, the Polkey decision was partially reversed and the "no difference" rule reinstated for a failure to follow procedures other than the 2004 dispute resolution procedures.

There has been some uncertainty over the scope of 98A(2), following separate EAT decisions which have found that "procedures" in 98A(2) (outside the 2004 procedures) may mean *either* any procedure, written or otherwise, which the tribunal considers in fairness the employer should have complied with, *or* only formal or existing procedures. However, recent cases have tended to follow the broader interpretation.

Assuming that the Dispute Resolution Regulations are repealed, making no changes to section 98A is not an option. This is because of the way the section currently makes separate provision for procedure outside the Regulations, as described above.

<u>Options</u>

(A) Revert to the position before the introduction of the 2004 procedures.

Repealing section 98A in full would reinstate the Polkey decision such that procedural failings would normally render a dismissal unfair, but compensation could then be reduced in proportion to the likelihood that the dismissal would have gone ahead anyway.

Pros

- reversion to a well-understood position;
- the *status quo* prior to 2004 was generally accepted by employer and employee interests.

Cons

- reversion to a situation which tends to leave both parties dissatisfied – the employer has a finding against them but the employee may have little or no compensation;

- would reintroduce inconsistency/lack of certainty around when a "Polkey" reduction in compensation could be made, though this could be tackled by specific rules on this point.

(B) Repeal section 98A in full, but provide for alternative findings reflecting the balance of procedural and substantive unfairness in the dismissal.

This would allow tribunals to make the nature of the finding clearer by distinguishing between dismissals which were unfair on procedural and substantive grounds. Thus there could be a finding that a dismissal was procedurally unfair but substantively fair, in which case a penalty could be imposed according to a scale with a low cap. Costs could also, as at present, be awarded against an employer who was wilfully obstructive during the tribunal process.

Pros

- greater clarity in the finding, justifying the low level of compensation in cases where the unfairness is purely procedural;

- employees with a finding of purely procedural unfairness in their favour will receive nominal compensation (unlikely to encourage claims on procedural points only);

- even a low compensation payment and the possibility of costs awards against them should act as an incentive on employers to follow due process in future.

Cons

- many respondents argued for no further change, and (given that that is not possible) may prefer straightforward reversion to pre-2004

- the risk that claims will turn into a two-part process – possibly increasing the number of hearings and/or appeals.

(C) Reverse the Polkey decision in full and revert to the "no difference" rule

If the 2004 procedures are repealed, then the repeal of 98A(1) and (3), which make dismissal automatically unfair if those procedures are not followed,

would be an inevitable consequential amendment. It would, however, be possible to retain 98A(2), amended so as to be no longer subject to 98A(1). This would in practice reverse the Polkey decision and reinstate the "no difference" rule for all dismissals.

Pros

- moves away from "Polkey" findings which leave both parties dissatisfied.

Cons

- original "no difference" rule was divisive and resented by employees;
- would be a complete reversal of the pre-2004 *status quo*.

Conclusion

The Government believes that Option B has the benefits of reverting to the intent of the pre-2004 position whilst providing for findings which enable procedural unfairness to be clearly distinguished from substantive unfairness.

How to respond

We would welcome responses to this review from all interested parties by 20 June 2007. A pro forma for responses is attached. Please say which, if any, of the suggested options you would prefer and provide any other comments.

A response can be submitted by letter, fax or email to:

Dispute Resolution Review Team
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000
Fax: 020 7215 0168
Email: disputereview@dti.gsi.gov.uk

For information on confidentiality, data protection and complaints in respect of this review, please refer to page 5 of the main consultation.

Pro forma response form

The closing date for this review is 20 June 2007. You may find it helpful to set out your response using this response form.

Name: Free Representation Unit----------

Organisation's name and
remit (if applicable): ----------

Address: 289-293 High Holborn, London WC1V 7----------

Email: Michael.reed@freerepresentationunit.org.uk----------

Return completed forms (preferably by e-mail) to:

Dispute Resolution Review
Department of Trade and Industry
Bay 4101,
1 Victoria Street
London SW1H 0ET
Fax: 00 44 (0) 20 7215 0168

E-mail: disputereview@dti.gsi.gov.uk

Please cross one box from the following list of options that best describes you.

☐ Individual
☐ Small to Medium Enterprise
☐ Large Enterprise
☐ HR professional
☒ Legal representative
☐ Trade Union
☐ Interest Group
☐ Regional Organisation
☐ Devolved Administration
☐ Local Government
☐ Central Government
☐ Other (please specify) _____

Is your preferred option for the future of the law relating to procedural fairness in unfair dismissal:

(A) *Revert to the position before the introduction of the 2004 procedures* ☒

(B) *Repeal section 98A in full, but provide for alternative findings reflecting the balance of procedural and substantive unfairness in the dismissal.* ☐

(C) *Reverse the Polkey decision in full and revert to the no difference rule* ☐

None of the above ☐

It is helpful if you can explain your views as fully as possible in the comments box, in particular if you have ticked “None of the above”. Please continue on a separate sheet if necessary.

Comments

Separating unfair dismissal into procedural and substantive rights may seem attractive, but would be extremely problematic in practice. The line between substantive unfairness and procedural unfairness is not clear or distinct. A failure to investigate, for example, may be either procedural or substantive or both. Any attempt to divide unfair dismissal into two separate causes of action will therefore lead to a great deal of confusion and difficulty. Tribunals and parties will expend considerable resources, not in determining whether a dismissal is unfair, but what form the unfairness took.

Returning to the no difference rule would do an injustice to many claimants. It allowed employers who had treated an employee extremely unfairly to excuse themselves by arguing that, if they had not acted badly they would have dismissed in any event. This was always an unattractive practice and we should not return to it. Employees should have a right to a fair procedure and, when that right is infringed, they should have a remedy in the tribunal.

Furthermore, unfair dismissal has increasingly become a procedural rather than a substantive right. At the point that the no difference rule applied tribunals were more willing to find that dismissal fell outside the range of reasonable responses and was thereby unfair. Subsequently case law and tribunal practice has moved away from this. To return to the no difference rule, without strengthening the tribunal's ability to review the employer's substantive decisions, would significantly weaken employee's rights, even compared with the previous position.

The previous position was a fair compromise. If the procedure used to dismiss an employee was unfair, they received a finding of unfair dismissal and compensation. Polkey reductions, however, prevented the significant awards being given where, because of the employee's wrongdoing, a fair procedure would have resulted in dismissal.