

THE PLANET OF THE APES – THE LEGAL LANDSCAPE AFTER GIBBONS

In this special feature Bevans Solicitors Head of Employment, Guy Hollebbon, and assistant solicitor, Lucinda Bromfield, look at the Employment Bill and its likely impact for practitioners.

‘The simplification of anything is always sensational’ G.K. Chesterton.

When the statutory disciplinary and grievance procedures were brought in by the Employment Act 2002 they were hailed as a brilliant innovation. Tribunal claims were meant to decrease dramatically as employers and employees settled their differences amicably over a nice cup of tea, everyone was meant to know where they stood and employment lawyers were going to become redundant.

Sadly (or otherwise, depending on your viewpoint) none of the above has come to pass. Instead the 2004 reforms gave birth to an unholy regiment of cases whose convoluted precedents on time limits and grievance letters have become the bane of many a practitioner. In addition, Tribunal claims have risen from 86,181 in 2004/5 to 132, 577 in 2006/7 with the majority now citing failure to follow the procedures as an element of the claim.

The Employment Bill is designed to deal with a system which the Gibbons Report describes as ‘inappropriately inflexible and prescriptive’. As it bravely leaps into the breaches identified by the Report we’re told that it will ‘simplify, clarify and build a stronger enforcement regime for key aspects of employment law’, save employers £180 million per year on dealing with employee disputes and relieve the burden on our over stretched Tribunal system.

But what does it actually say?

Sections one and two cut straight to the chase and repeal the pesky provisions that were causing all the problems in the first place: Sections 29 – 33 and Schedules 2-4 of the Employment Act 2002 and Section 98A of the Employment Rights Act 1996 [ERA] which, in glorious combination, introduced the Statutory Dispute Resolution Procedures.

So far as expected, but so far so good? Well it’s a start, although unless the repeal of the statutory procedures has retrospective effect the Tribunal could be faced with a claim where part of it relates to a time when the statutory procedures applied and part does not. Quite what impact this will have on time limits, compensation and the sanity of employment lawyers only time will tell.

Section 3 is where it gets intriguing. The scope of Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TU & LR (C) Act) has been amended to allow any Court, Tribunal or the Central Arbitration Committee to reduce or increase any award made by 25% if the employer or the employee have failed to follow a relevant Code of Practice.

Which of course, leads to the question – what is a relevant Code of Practice?

A relevant Code of Practice is one issued by ACAS or the Secretary of State under Chapter 3 of the TU & LR (C) Act – in short, anything either of them choose to be relevant. The ACAS Council is currently putting together a remit for a new Code of Practice covering workplace disputes. ACAS have indicated that the Code will be principles based and will not contain complex and proscriptive procedural steps. This is certainly to be welcomed although we await the draft Code with interest to see if the drafters have

managed to strike the right balance. There is some danger that the Courts and Tribunals will be invited to set out by case law what procedural steps are required to comply with the broad principles contained within the Code. running the risk of the Tribunals being forced to make rules as to the standard to which employers and employees should be held – something the ACAS Code is meant to avoid.

The ACAS draftsmen (and women) are going to have to tread a fine line between allowing for variation in practices and providing a degree of certainty and it is likely that the word 'reasonable' will feature highly. There is also the question of how one Code covers a small employer with 2 employees and a large multi-national corporate with many thousand staff. Will ACAS feel that there should be separate Codes or separate sections for different sizes of employers? If so, where will the dividing line be drawn? Will the Code draw distinctions between conduct and incapability dismissals? Will it cover redundancies? It is hoped that a draft Code will be made available as soon as possible in order that employment law practitioners can at least see the broad contours of the new landscape if not the detail of the rivulets and gulleys.

Whatever principles it enshrines, it is likely that any code ACAS produces will include alternative dispute resolution (ADR) and more specifically mediation, Many commentators were surprised that the Government's response to the Gibbons Report, namely the Employment Bill, does not itself mention mediation, particularly as Michael Gibbons commended the increased use of mediation to employers, employees and practitioners in the foreword to the Report. Further the Gibbons Report recommendations included offering a free early mediation service and offering incentives to use early dispute resolution by way of increasing or decreasing awards and cost orders. We can only hope that this has not been omitted but rather is yet to come within the ACAS Code of practice.

It has been said by critics of the Employment Bill that mediation should be compulsory in workplace disputes. We feel strongly that compulsion is not advisable when dealing with a process which is built on voluntary agreement between the parties but have no doubt that the use of mediation in employment disputes is going to grow and grow – and we suspect that the Tribunals, like the courts, will move further towards imposing penalties on parties who do not try to resolve their issues through ADR before resorting to litigation. We anticipate that the civil litigation case law in this area, culminating in *Halsey v Milton Keynes General NHS Trust* (2004) 4 All ER 920, will becoming increasingly familiar to employment practitioners. In-house mediation is also growing in popularity (especially amongst larger private and public sector organisations) and we expect this trend to continue.

So, statutory grievance and dismissal procedures are out, but Codes of Practice are to be given teeth. Section 207(1) TU & LR (C) Act makes it clear that a Code of Practice is not compulsory in the same way the statutory grievance and dismissal procedures are now, but with the threat of 25% either way on an award we know what we'll be advising our clients. Whether this will result in us swapping one set of inflexible procedures for another, or honing our ability to apply a set of aspirational ideas to a factual process remains to be seen when the draft Code of Practice is issued by ACAS.

Another ramification of the removal of the statutory procedures is the glorious resurgence of the Polkey Deduction. Though it never went away, with the repeal of Section 98A ERA it will no longer be possible for an employer to argue that it would have dismissed an employee in any event and so a procedural failing on the part of the employer in not following its own procedures or a relevant Code of practice should not lead to a finding of unfair dismissal. We will shortly be firmly back in the traditional Polkey position that in such a case there would be a finding of unfair dismissal although if a procedure was not conducted in 'best practice' but it made no appreciable difference to the outcome, the employee should have their compensation reduced accordingly.

We also expect to see more argument on whether it is the employer's or the employee's fault that the appropriate procedure has not been followed. Exactly how this will play out is uncertain, but in situations where an employer is trying to get a sick employee to attend the appropriate meetings this could prove interesting. Presumably the Tribunals will take a stance on what is 'reasonable' in terms of making efforts to comply with a 'reasonable' process and we expect to see some equivalent of the current procedures to deal with those instances where the employee and employer (for whatever reasons) are unable to meet.

Section 4 of the Bill amends Section s7 (3A) of the Employment Tribunals Act 1996. It will no longer be possible for a Tribunal to determine proceedings without a hearing unless the parties have been given a right to request a hearing (which they choose not to exercise), or all parties consent to the determination without a hearing. This may have a knock on impact on the Employment Tribunal Rules and in particular Rule 8 which deals with default judgments which determine proceedings without a hearing. Self evidently, the parties will not consent to a default judgment (save in the exceptional circumstance where the employer does not intend to resist the claim). By having had the opportunity to put a response in will this be seen as giving that party a right to request a hearing or will the scope of default judgments be much curtailed? We will have to wait and see whether the Employment Tribunal Rules will be amended or if not, whether they will be challenged.

Section 5 is promoted as key to cutting down the number of claims making it to Tribunal. Following an amendment ACAS “may endeavour to promote a settlement between the parties” prior to proceedings being instituted. The idea is that ACAS will become involved in the very early stages of a dispute (rather than when they receive a copy of the ET1 as is the usual procedure at the moment) in the hope that they can arrange a conciliation between the parties before any claim has been lodged with the Tribunal. Either party to the dispute can ask them to get involved. Somewhat bizarrely, the current wording relating to pre-issue conciliation is that where a request is made by a party for pre-issue conciliation ACAS *shall act* to “endeavour to promote a settlement of the proceedings without their being determined by an employment tribunal”. There is no substantive increase to the current powers of ACAS to get involved at the pre-issue stage so the question arises as to how this ‘new’ wording will cut the number of Tribunal cases. The answer given by ACAS is that currently pre-issue conciliation is rarely requested and under the new regime there will be greater promotion of this service. Secondly, ACAS currently take a very narrow view of the type of cases they will conciliate pre-issue however they have indicated that this will be widened under the new regime. Whether this happens remains to be seen.

The statutory fixed conciliation periods will no longer apply, but it is unclear whether there will be any time limits to ACAS involvement. We suspect that they will have some pretty strict internal guidelines about when they will attempt to conciliate and how long for but we’re still waiting for details on how they perceive their “new” role. We are also waiting for details of whether additional funds will be made available to them to take on the potential increase in work.

But however their new role is interpreted or funded, it is clear that change is afoot, potentially bringing with it some complications. The first of these that occurred to us is whether it will be possible to get two bites of the ACAS cherry – that is, help conciliating both before and after issue - or whether ACAS will become a one stop pre-issue shop. If this is the case, then the strict time limits for bringing employment cases might need some rethinking – or parties may find themselves going to Tribunal anyway as the limitation date was fast approaching. Alternatively, those bringing claims close to deadlines may be able to escape needing to go through the conciliation process with ACAS and there may, on occasion, be tactical advantage to doing this. We’re hoping that the powers that be are giving some thought to these matters as it would be helpful to know exactly when (and when not) we can expect ACAS to be involved and we’d like to avoid time limit issues becoming any more complex.

In fact, the time limits (given that they are effectively tied in to the statutory grievance and disciplinary procedures at the moment) may require a rethink. As the Bill currently stands the extension presently available to the three month time limit where the statutory procedures are ongoing will be lost and we will presumably go back to the original time limit of 3 months from the date of the incident giving rise to the claim. We aren’t sure how this will fit in with ACAS conciliation pre-issue and any new procedures suggested by the Code (or the Tribunals interpreting the Code). We await developments with interest.

So, assuming that ACAS (at whatever stage of the proceedings) conciliates successfully, how are the parties going to record their agreement? Will compromise agreements still be the usual form, or will an ACAS COT3 be available for pre-issue conciliated cases? If so, this would be a cheaper route for employers to deal with agreed departures rather than having to use a compromise agreement which would entail a contribution towards legal costs. Of course, a compromise agreement would also require the employee to consult a lawyer, who might advise that the compromise agreement does not reflect their proper entitlement. If a COT3 is used then an employee in an equivalent position would not have the protection of independent legal advice to safeguard their position.

In addition, many employees and some employers are funded by legal expenses insurance. Anyone who has worked in this market is conscious of the fact that few insurers will provide insurance cover until the issue of the ET1. This being the case, how will the emphasis on pre-issue conciliation affect these clients? We're speculating that the insurance industry is unlikely to be keen to change their terms to provide cover pre-issue. Potentially, this could restrict access to legal advice to employees (and possibly employers) just when they need it the most. With a greater emphasis being placed on pre-issue resolution we feel that insurers (and ultimately the Financial Services Ombudsman) should take a wider approach to "proceedings" and should provide cover for such pre-issue conciliation.

Section 7 of the Bill gives a Tribunal the power to award such additional financial compensation as it sees fit to compensate the worker for any loss attributable to an unlawful deduction from wages or failure to pay a redundancy payment. This gives employees the ability to claim full compensation for loss suffered as a result of employers withholding these payments, rather than capping their loss at the amount of the payment withheld. In theory, it could cut down the number of claims on other points linked to a non-payment by the employer as employees will be able to get full redress for their loss without having to have additional causes of action on which the Tribunal can hang an additional payment.

However, it also raises the question of what a Tribunal will consider to be 'attributable loss'. Take, for example, an employee who has lost his or her house because an employer failed to pay wages which were due and as a direct result the mortgage payments could not be met. We suspect some element of foreseeability similar to the tort of negligence will be introduced – though in that case, we may all end up advising our employee clients to tell their employers if there are issues with their mortgage repayments! Quite how far a Tribunal will go in awarding such loss will have to be determined and we anticipate the EAT being called upon to clarify this area in due course.

Sections 8 to 13 of the Bill deal with the National Minimum Wage. In short, they introduce a new civil penalty (fines of between £100 and £5000) for non-compliant businesses, a new method of calculating arrears, enhanced inspection powers (officers can now take records away and copy them wholesale no longer being restricted to 'any material part'). Lastly, section 13 of the Bill clarifies a point on which most of us were blissfully ignorant - Cadet Force Adult Volunteers don't have the right to the National Minimum Wage.

Sections 14 to 16 strengthen the Employment Agencies Act 1973 which regulates employment agencies and employment businesses. The amendments make offences triable either way and give the Employment Agency Standards Inspectorate greater powers. They will now be able to inspect a wider range of documents (including financial documents) and to demand in writing delivery to them of documents or information. They may also demand documents/information from those previously associated with the agency and financial records from banks. Needless to say, they can also take copies.

Section 17 is a direct result of *Aslef v UK*. Trade Unions can now refuse membership/expel people on the grounds of membership or previous membership of a political party.

So will the Employment Bill do what it is meant to? Will it require further satellite litigation? Or will Relevant Codes answer all our quandaries? Hopefully these questions will be answered in April 2009 when the Bill is meant to come into effect. As always with new legislative provisions there are going to have to be transitional arrangements. This may lead to Tribunals having to work with both old and new law – something which we are sure they will take in their stride. But it will make advising particularly tricky given that employers may want to change their procedures (or may have to to comply with the ACAS Code), but are going to need to ensure they comply with the statutory procedures until the new Bill is fully implemented. Practically, this is likely to mean that change is slow and that procedures are probably going to follow the template laid down in the 2002 Act for some time to come. Still, there isn't much wrong with a basic template of written allegations, meeting, decision and right to appeal. We suspect the formula will remain the same, but will be widened after the implementation of the new Bill to give employers (and employees) more scope for informal meetings with a view to settling things without the need for the formal procedure – and without the risks not adhering strictly to those procedures carry at present.

There may also be difficulties in applying the new law on unlawful deductions – should it be applied to all cases heard after the Bill is implemented, or only those instigated afterwards? This may lead to two similar cases having very different outcomes depending not on their facts, but on the date an ET1 was issued. This in turn may lead to claimants trying to delay issue until the new provisions are effective or simply to general confusion.

Whatever the transitional provisions and however difficult the change we believe that the majority of the employment law world will welcome the Bill as a much needed reform. Whether or not it lives up to expectations remains to be seen – roll on April 2009!

The Employment Bill – what you need to know:

- To be introduced in April 2009 (or so we're told but we expect delays...)
- Repeals Statutory DDP and GP
- Possible 25% increase or decrease of an award for failure to follow a relevant Code of Practice
- "Extended" powers for ACAS to be involved from the start of disputes and to try and prevent them reaching Tribunal stage.
- New provisions to allow the Tribunals to give additional financial compensation in cases where contractual sums owing to employees (redundancy or wages) are claimed.
- National Minimum Wage: new methods of calculating arrears, a new civil penalty, enhanced inspection powers and offences to become triable either way.
- Employment Agencies Act – new powers of inspection, offences triable either way.
- Trade Unions can now refuse someone membership as a result of his or her membership or previous membership of a political party.

For further information please contact Guy Hollebon (ghollebon@bevans.co.uk) or Lucinda Bromfield (lbromfield@bevans.co.uk) on alternatively telephone on 0117 923 7249.

Grove House
Grove Road
Bristol BS6 6UL

phone 0117 923 7249
fax 0117 923 7253
DX 99880 Bristol Redland
email info@bevans.co.uk

46 Essex Street
The Strand
London WC2R 3JF

phone 020 7353
9995
email the_strand@bevans.co.uk