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# Employment Act 2002

**The Employment Act 2002 received Royal Assent on 8 July 2002. Broadly its themes are work and parents and procedures: both internal and tribunal. Something of a hotchpotch of issues are therefore covered. It creates completely new rights, tinkers with hallowed principles and time-honoured procedures and is littered with new TLAs (three letter abbreviations) for the jargon junkies.**

It contains new rights for Union Learning Reps and the right to request flexible working, the delayed implementation of the Fixed Term Workers' Directive, changes to Employment Tribunal procedure, extensions to existing maternity pay and leave rights and, for the first time, statutory paid paternity leave and adoption leave and pay. Additionally, it introduces the requirement to follow mandatory internal procedures as a precondition of commencing tribunal proceedings.

It is also mixed in the sense of what it seeks to achieve – with one hand creating and extending rights, with the other curtailing rights by restricting access to Employment Tribunals and weakening the protection against unfair dismissal. So the Act will be good in parts: much to be welcomed, but some cause for concern. Just how good and how concerning is still largely up for grabs with detail to be decided in regulations, some as yet unpublished, some already in draft for consultation. The first parts to come into force are the fixed term work provisions effective as from 1 October 2002. The rest will be implemented from April 2003.

This special expanded edition of *Thompsons' Labour and European Law Review* is entirely devoted to the Employment Act 2002, explaining, interpreting and analysing its effect and implications.

- The introduction of two weeks paid paternity leave: available in respect of both birth and adopted children.
- The introduction of paid adoption leave, to mirror broadly the maternity leave provisions.
- Implementation of the Fixed Term Work Directive from 1 October 2002 to reduce the use of fixed term contracts and introduce anti-discrimination provisions to cover pay and pensions as well as contractual and treatment issues.
- The introduction of a right to request flexible working that must be considered seriously by the employer and refused only on specified grounds.
- Changes to maternity leave: Ordinary Maternity Leave (OML) is extended from 18 to 26 weeks with entitlement to maternity pay throughout the period. The qualifying period for Additional Maternity Leave (AML) will be reduced to match SMP meaning all women with 26 weeks service 15 weeks before their baby is due will qualify for both OML and AML. AML will be for 26 weeks
- The creation of Union Learning Reps with rights to paid time off.
- The introduction of statutory questionnaires in equal pay claims.
- The introduction of statutory dismissal and disciplinary procedures that must be followed by employers.
- The introduction of statutory grievance procedures that must be followed by employees, or at least commenced, before tribunal proceedings can be lodged.
- Changes to unfair dismissal law so procedural failings will not necessarily count against an employer.
- Stronger rights for employees to receive fuller statements of their employment particulars.

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# It's a family affair

**Part 1 of the Employment Act 2002 sets out the framework of the new provisions for paternity and adoption leave and pay and the reforms to the current maternity pay and leave schema. Part 4 includes the new right to request flexible working. The Act will be supplemented by regulations – still in draft form at present. They are planned to come into force in April 2003, so will affect parents of children conceived this August onwards.**

## PATERNITY LEAVE AND PAY

Currently, under the Maternity and Parental Leave Regulations 1999 each parent is entitled to take 13 weeks unpaid parental leave to care for a child. Fathers do not have any statutory right to paid leave. The Employment Act creates the right to two weeks statutory paid paternity leave to be taken within eight weeks of the child's birth, or in the case of adoption, to be taken within eight weeks of the placement for adoption.

Paternity leave is in addition to the existing 13 weeks unpaid parental leave.

The leave is available for the specific purpose of caring for a newborn child or a newly placed child for adoption and for the purpose of supporting the mother or adoptive parent.

### Eligibility

The right will be subject to various conditions set out in the draft Maternity, Paternity and Adoption Regulations. They provide that to qualify for paternity leave an employee must satisfy that s/he:

1. Has been continuously employed for a period of not less than 26 weeks by the end of the 15th week before the expected week of the child's birth or the week in which the child's adopter is notified of being matched with the child for the purpose of adoption; and
2. Has or expects to have responsibility for the upbringing of the child, and
3. Is the biological father of the child or is married to, or the partner of, the child's mother or adopter, which will therefore cover gay couples as well as unmarried heterosexual parents; and
4. Has given notice as specified by the Regulations. The draft regulations include model documents for compliance with the notification obligations.

### Rights during and after paternity leave

The draft regulations provide that during paternity leave the employee will be entitled to the benefit of, and bound by, their terms and conditions of employment, excluding those about "remuneration", as if they were not absent. Remuneration is defined in the draft regulations as only sums payable as wages or salary and therefore may not include bonuses or benefits in kind.

On return to work, the employee is entitled to their job and to the terms and conditions which would have applied, had they not been absent.

The current protection from detriment and dismissal relating to maternity and parental leave rights will be extended to employees taking paternity leave.

An employee who qualifies for paternity leave will, however, be prevented from taking this leave if s/he has also decided to take adoption leave (see below).

In the case of multiple births, the paternity leave period is not multiplied by the number of babies born: it remains at two weeks.

### Statutory paternity pay (SPP)

An employee who takes statutory paternity leave will be entitled to statutory paternity pay which will be financed by the government and administered by employers in the same way as the standard rate of maternity pay. The rate proposed for 2003 is the lesser of £100 or 90% of the employee's average weekly earnings. As with paternity leave there are number

of qualifying conditions such as employees will be required to have completed 26 weeks of continuous service by the fifteenth week before the child is expected to be born, or by the week in which an approved adoption agency matches an adopter with a child.

## ADOPTION LEAVE AND PAY

The concept of statutory rights to adoption leave received unanimous support during the government consultation process and it seems extraordinary that it does not already exist.

The statutory scheme, due to be operational from April 2003 is set out in the Employment Act (S.3 which amends the Employment Rights Act 1996 part 8 with Ss75A-D) and the draft Paternity and Adoption Leave Regulations.

It aims to mirror maternity leave as closely as possible for around the time of placement for adoption. Male or female employees who satisfy the eligibility conditions may be absent from work at any time during an ordinary adoption leave (OAL) period and an additional adoption leave (AAL) period.

### Eligibility

The eligibility conditions relate to notice and evidence requirements including a matching certificate which is intended as the equivalent of a MATB1 from the adoption agency (as opposed to a medical practitioner/midwife) but otherwise mirroring maternity leave notice requirements. So for example there is an Expected Date of Placement (EDP) (rather than an Expected Week of Childbirth) and where the EDP changes, notice of variation must be given of 28 days, unless it is not reasonably practicable.

There will be a service requirement of 26 weeks as at 15 weeks before the EDP, unlike OML, but adoption leave is not available where the child is already known to the adopter such as in step-family arrangements and where fostering precedes adoption.

With joint adoptions (currently only available to married couples) either parent may elect for adoption leave, otherwise it is only the legal adopter of the child who is eligible. In either case however, the parent not taking adoption leave may be eligible for paternity leave (see above).

### Rights during and after adoption leave

The period of leave – both Ordinary Adoption Leave (OAL) and Additional Adoption Leave (AAL) will mirror the length of maternity leave – Ordinary Maternity Leave (OML) and Additional Maternity Leave (AML) and there will be identical rights during and after adoption leave as is the case with maternity leave. So for example, there is the same protection from redundancy during adoption leave and co-terminous protection of contractual and employment rights both during and after adoption leave as for maternity leave. Protection from detriment and dismissal will also be extended to adoption leave.

The OAL period will therefore be up to 26 weeks from the date on which a child is placed for adoption (ie. arrives to live permanently with the adopter) or no more than 14 days before the EDP. This is eight weeks longer than the current OML period, which will be increased from April 2003 (see below).

AAL will be for a further 26 weeks after the expiry of OAL, which is also in line with the amended AML provisions to come into force in April 2003.

### Statutory adoption pay

The Employment Act 2002 introduces statutory adoption pay (SAP) – again on similar lines to the statutory maternity pay scheme, with government funded employer refunds of between 92% -100% depending on the size of employer. It will be at comparable rates to lower rate SMP for a period of up to 26 weeks – ie to cover the OAL period, but there is no statutory higher rate of SAP, unlike the first six weeks of OML. Three sets of draft regulations are currently out for consultation on the general provisions, weekly rate and administrative arrangements for SAP and SPP.

## MATERNITY LEAVE AND PAY

There will be changes to both maternity leave and pay as a result of the Employment Act and related regulations.

From April 2003 OML will increase from 18 to 26 weeks and AML will be available for up to a further 26 weeks commencing from the end of OML, instead of the current 29 weeks. The total period of maternity leave available will therefore be exactly one year.

### Eligibility

The qualifying service requirements will be simplified. At present three tiers apply – there is no service requirement for entitlement to OML, a requirement of 26 weeks service as at the 15th week before the expected week of childbirth for Statutory

Maternity Pay (SMP) and a service requirement of one year for AML. Entitlement to AML will be reduced to match the SMP service qualification. As from April 2003 a woman with 26 weeks service as at 15 weeks before her baby is due will be entitled to both AML as well as OML. AML is unpaid, unless as a contractual entitlement.

The notification requirements will also change, if the regulations do not alter from their current draft provisions. An employee will be required to notify her employer of her pregnancy, the expected week of childbirth and the date she intends to commence her OML in or before the 15th week before the week she expects her baby to be born, which is earlier than the present regime. There will be scope to amend the intended start date of her leave with at least 28 days notice where reasonably practicable. The employer will be under a duty to inform the employee in writing of her leave period and expected week of return.

### Trigger rule

The current rule whereby pregnancy related sickness six weeks or less before the expected week of childbirth automatically triggers the employee onto OML will be reduced to four weeks under the draft regulations.

### Statutory maternity pay

Statutory maternity pay provisions will also change – the six weeks higher rate of SMP (90% of average pay) will remain, subject to the existing eligibility criteria, but the £75 underpin will go. For the remaining 20 weeks of OML, SMP will be 90% of pay or £100, whichever is the lower under the draft regulations. The notification requirements for receipt of SMP will also change. A woman must inform her employer of the date she expects liability for SMP to begin to increase from 21 to 28 days.

The Maternity Allowance will also be uprated in line with SMP.

## FLEXIBLE WORKING

S. 47 of the Act has tried to meet parents' desire for more flexible work patterns in a way that is compatible with business efficiency. This section gives parents the right to apply for flexible working. It amends Part 8 of the Employment Rights Act 1996. Once again the new statutory right set out in the Act is backed up by regulations, currently in draft form, as to eligibility and procedural requirements. These are the draft Flexible Working (Eligibility, Complaints and Remedies) Regulations and the draft Flexible Working (Procedural Requirements) Regulations.

### The right to request

The Act provides for qualifying employees to be able to apply to their employer for a change in their terms and conditions of employment, if a change relates to one of three specified aspects:

- the hours or times when he/she is required to work,
- the times when he/she is required to work,or
- where, as between his or her home and a place business of his/her employer, he is required to work,

There is power for the secretary of state to add to the list by regulation.

In addition, the purpose for applying for the change must be to enable the employee to care for a child.

Any application must be made before 14th day before the day on which the child concerned reaches the age of 6, or if the child is disabled, 18.

It is important to bear in mind that if the request is granted it will be permanent and the employee has no statutory right to revert to their previous contractual terms, although this will not preclude an entirely voluntary agreement being reached between the employee and his or her employer.

### Eligibility

Only a "qualifying employee" can apply for a flexible working arrangement: this will include neither agency staff nor workers who fall outside the definition of employee. There is regulation making power to stipulate service requirements and the draft out for consultation states not less than 26 weeks continuous employment.

The draft eligibility regulations also provides for conditions as to the relationship between the child to be cared for and the employee making the flexible working request. They are twofold – he or she must have, or expect to have responsibility for the upbringing of the child and either be the biological parent, guardian, adopter or foster carer of the child, or be married to or the partner of the biological parent etc and be living with the child. The draft definition of partner is a person (whether of a different sex or the

same sex) who lives with the child and the mother, father, adopter, guardian or foster parent in an enduring family relationship but who is not a blood relative.

The Act stipulates certain procedural steps that should be taken by both the employee and the employer. The application should state the change applied for, and the proposed date that the employee would like the change to become effective. The employee should also explain what effect this change would have on the employer and how this could be dealt with, as well as stating the relationship between them and the child. If any information within the application is false, the employer may be entitled to take disciplinary action against the employee.

If the employee makes an application, he or she cannot make a further application under this section to the same employer within twelve months of the date of the previous application.

## Employer's obligations

Having the right to request flexible working is all very well – the punch in the new right comes in what the employer has to do with it. There are both substantive and procedural provisions in the Act. The employer shall only refuse an application if he believes one or more of the following grounds applies:-

i the burden of additional costs

ii any detrimental effect on the ability to meet customer demand

iii inability to organise work amongst existing staff

iv inability to recruit additional staff

v detrimental impact on quality

vi detrimental effect on performance

vii insufficiency of work during the period the employee proposes to work

viii planned structural changes.

There is also scope for additional grounds to be included by regulation.

The employer should meet the employee within 28 days of the date the application is made to discuss the application and provide a decision within 14 days after the date of the meeting. If it refuses an application, the notice of the decision must state the grounds for the decision and the employee has a right to appeal within 14 days after receiving the decision to refuse his or her application. An appeal meeting should be held within 14 days of the date of which notice of the appeal is given by the employee, and any employer should, within 14 days after the date of the meeting, provide a decision to the appeal. These time limits can be varied by agreement between the employer and the employee.

The employee will have the right to be accompanied at these meetings. Who qualifies as a companion will be specified by regulation. In the draft regulations for consultation the definition is wider than the current statutory accompaniment provisions in disciplinary and grievance hearings. It also includes "another member of staff from the workplace" regardless of their competency and training for the task.

If an employer has failed to comply with their duties under the Act in relation to an application, or the employee believes that the decision that the employer has made to reject an application is based on incorrect facts, a complaint can be made to the Employment Tribunal. The tribunal will award compensation on a just and equitable basis and make an order for reconsideration of the application by the employer. The Tribunal does not have power to impose a flexible working arrangement on the employer. The time limit for an application to the tribunal is three months from the date of notification of the appeal decision or breach of duty and time can only be extended if it was not reasonably practicable to comply with the time limit. This mirrors the stricter, unfair dismissal, rather than the discrimination regime where time can be extended if it is just and equitable.

In order to protect any employee who makes an application for flexible working, the Act introduces a right for them not to be subjected to any detriment and where any employee is dismissed for exercising any of these statutory rights, their dismissal will be automatically unfair.

The Act has at least made it a legal obligation on employers to consider adapting their working environments to encourage flexible working and this is supported by the number of procedural steps that must be followed when arriving at their decision, but time will tell whether this legislation has much practical impact.

# Tribunal reform

## We don't need no regulation

**Part 2 of the Employment Act introduces a fixed period of conciliation to promote timely settlement of disputes, a fast track system for the hearing of cases and other measures purportedly to modernise Employment Tribunals. It will be done not by the Act itself, but by conferring regulation making powers on the government and the President of Employment Tribunals. The devil, if any, will be in the detail of regulations, which are awaited. The fear is that regulations will deter applicants by increasing formality and the likelihood of costs awards against them, whilst doing little to reduce delays and inefficiencies in the system which have more to do with the resourcing of the Employment Tribunal Service. The power inequality between employer and employee cannot be ignored in the tribunal rules – the impact of a costs order on an employee is of an entirely different nature to one against an employer. However until we see the regulations, the scale of the intended changes is unknown.**

## Employment Tribunals Costs and expenses

S.22 of the Employment Act extends the scope of S. 13 of the Employment Tribunals Act 1996. The Employment Tribunal Procedure Regulations may include provision for the award of costs or expenses or allowances. Allowances are those paid to and from the tribunal members and others required to attend an Employment Tribunal.

This provision also gives the Secretary of State power to authorise tribunals to make awards of costs directly against a party's representative because of the way the representative has conducted the proceedings.

An award of costs could mean that the representative may not recover his/her fees from the client, or that he/she has to pay costs incurred by the client, or costs incurred by the other party, as a result of his/her misconduct.

Costs orders are likely to be available against a paid representative which would include lawyers and employment consultants who charge for their services, however it is likely to exclude trade union representatives, Citizens Advice Bureau and legal advice centre staff and other non-profit advisers.

As a consequence of the harsh ruling in the **Kovacs v Queen Mary and Westfield College** [2002] EWCA Civ 352 tribunal regulations may well enable tribunals to take account of a person's ability to pay costs. In that case the Court of Appeal held that the applicant's means were irrelevant and a costs award against her of £62,000 was upheld.

## Compensation for preparation time

The Employment Tribunal Procedure Regulations may include provision for authorising an Employment Tribunal to order a third party to proceedings to make a payment to any other party in respect of the time spent by that other party in preparing his/her case. It is not intended that the parties should have to prove how much time they have spent preparing for a case, but that the Tribunal should make an assessment based on guidelines to be set out in the Employment Tribunal Rules of Procedure.

This appears to be limited to employers preparing the case. It is unclear exactly who is "preparing a case" and whether it will it cover the person representing the individual or everyone involved, for example a personnel officer, or witnesses preparing their statements.

## Employment Appeal Tribunals

S. 34 of the Employment Tribunals Act 1996 is amended by S. 23 of the Employment Act to make similar provisions regarding costs against representatives as set

out for S. 22. However, there is no provision in respect of allowances. There is a provision for wasted costs orders against representatives and specific provision for taxation or detailed assessment of costs.

## Conciliation

S. 24 of the Act puts focus on settling cases amicably. It introduces a fixed period of conciliation during which parties can concentrate and try to find a solution to their problem on which they can both agree with the help of ACAS. The government believe that this will cut down on prolonged negotiations that do not get resolved until, sometimes, quite literally, the parties are on the steps of the Tribunal. The duration of the fixed period is yet to be determined. Extensions to the fixed period may be granted only while the conciliator considers that an imminent settlement is likely. Once the conciliation period is over, the ACAS conciliator will have the power to decide whether to continue to conciliate the case or to pass it back to the Employment Tribunal to fix a hearing date.

## Power to delegate prescription forms etc

S. 25 of the Act enables the Employment Tribunals Procedure Regulations to ask the Secretary of State to prescribe a form which is required to be used to institute proceedings in a Tribunal. The clause also enables the Secretary of State to include the requirements of the form, partly in the rules and partly outside the rules. Similar powers would apply to ET3s. It is thought that the mandatory form and notice will provide more information to the tribunal, and to the other side, at an earlier stage. The clause also enables the rules to delegate to the Secretary of State the power to prescribe that certain documents (e.g. written statement of particulars of employment) accompany either form.

## Determination without a hearing

S. 26 allows Employment Tribunals to permit cases to be determined without a hearing where both parties have given their consent after receiving independent advice.

## Practice directions

The Act gives new powers, in S.27, for the President of the Employment Tribunals to issue practice directions to ensure a consistent approach by Tribunals throughout the country.

## Pre-hearing reviews

Tribunals will have the power to strike out weak cases at the pre-hearing stage under S. 28. At present the power to strike out is limited and rarely used. The objective is to limit the number of very weak cases reaching a full hearing by confirming the tribunal's power to strike cases out at this stage in the process.

The findings of the DTI sponsored Employment Tribunal Task Force are still awaited but it has been tasked to make recommendations on how the Tribunal service can be improved and will advise on operational aspects in the course of the coming legislative changes. The task force role could be hugely influential in shaping the scope of the regulations and determining how the new powers are used.

# Dispute Resolution

## Following procedure or going through the motions?

**Part 3 of the Employment Act sets out the framework intended to reduce the burden on Employment Tribunals and aid the in-house resolution of individual employment disputes. It is the most controversial part of the Act and appears to chip away at existing unfair dismissal rights. Much will depend on the as yet unpublished regulations that will accompany the Act, and the timetable for implementation is vague – mid 2003 at the earliest. Here we outline the main provisions.**

## NEW STATUTORY DISCIPLINARY AND GRIEVANCE PROCEDURES

The Employment Act introduces statutory disciplinary and grievance procedures which set out minimum standards employers and employees will be required to meet. It will be a contractual requirement (Section 30) that every employer and employee comply with the requirements of the statutory disciplinary and grievance procedures.

This is welcome, but the standards fall short of the ACAS Code which was revised as recently as last year with the involvement of employers' organisations and unions.

Failure to follow the procedures also has consequences for tribunal claims, as are set out below.

### DDP: poison or palliative?

There are two forms of Dismissal and Disciplinary Procedure (DDP).The standard DDP proposes three steps: notification of the reason for discipline; a meeting to take place before disciplinary action is taken; and, a right of appeal. The meeting will count as a hearing which gives the worker the statutory right to be accompanied by a trade union official or fellow worker.

The standard DDP does not appear to require decisions to be notified to the employee in writing.

Worryingly, there is also a modified DDP which consists only of an appeal when the dismissal has already taken place. There appears to be a suggestion that it may be appropriate for employers to dismiss for alleged gross misconduct without a hearing and merely to allow a right of appeal after the dismissal has taken effect.

The consequences of a failure to follow a DDP are set out below.

### Prescribed GPs: what the doctor ordered?

There are similar provisions for grievance procedures (GPs). The employee must set out their grievance in writing; the employer must arrange a meeting and then notify the employee of the decision and of the right of appeal. The employee must inform the employer if they wish to appeal and another meeting must be arranged. There is a modified procedure which is likely to be required to be followed in cases where the employee no longer works for the employer.

The procedures are critical for employees who will, if they fail to follow the GP:

i) have their compensation reduced (see Section 31); or

ii) be prevented from bringing a Tribunal claim (Section 32).

The government has however indicated that the GP not need to be invoked in unfair dismissal cases other than constructive dismissal claims where the modified procedure only will apply.

### Non-completion of statutory procedure: effect on compensation

Employment Tribunals (ETs) can (and in some cases must) adjust compensation if the statutory discipline and grievance procedures have not been completed before the tribunal proceedings were begun. This applies to most claims capable of coming before an ET – including all forms of discrimination, equal pay, breach of contract, unauthorised deductions, unfair dismissal and working time regulation breaches.

If the failure was wholly or mainly the employee's fault, the ET must reduce compensation by 10% and may reduce it by up to 50%. If it was wholly or mainly the employer's fault, the ET must increase compensation by 10% and may increase it by up to 50%.

The 10% increase or reduction must be made whenever there is a failure, unless the ET decides it would not be just and equitable or there are exceptional circumstances.

The adjustments are to be made before reductions for contributory fault or redundancy payments in excess of the basic award (Section 40).

### Complaints about grievances (Section 32)

This provision seriously restricts an employee's ability to pursue Employment Tribunal claims if she or he has not complied with the statutory grievance procedure. The list of claims covered is again extensive – all forms of discrimination, equal pay, unauthorised deductions, unfair dismissal and working time regulation breaches. The only jurisdiction absent appears to be breach of contract claims and the government has indicated that GPs will not apply in dismissal cases apart from constructive dismissal.

In particular, an employee is prevented from presenting a complaint to a tribunal if she/he has not completed step one of the relevant GP. This means that the grievance must be put in writing and further, the employee must then wait for 28 days before lodging a tribunal claim. The aim is to give employers an opportunity to address the grievance before tribunal proceedings are instituted, but another effect is to raise barriers to access to tribunals.

However an Employment Tribunal is only prevented from hearing a complaint if failure to comply with the grievance procedure is apparent from the information supplied by the employee or the employer has raised it as an issue.

The Secretary of State has power to make further provisions relating to the application of the statutory GPs including what constitutes compliance with putting a grievance in writing and the circumstances in which an employee is to be treated as having complied with the statutory grievance procedures.

### The time limits they are a-changing? (Section 33)

The requirement to follow procedures before lodging an ET claim means that employees and their representatives will need to keep a keen eye on the three month time limit for lodging employment tribunal claims.

Under section 33, the Secretary of State may make regulations about the time limits for employment tribunal claims including extending the time limit, exercising discretion or treating cases as having begun in time. Although there are no firm details on this as yet, the government intends to extend time by three months where procedures have not been completed within the existing time limit.

### Who is covered?

The DDP and GP provisions will apply to employees. This means that although workers have a right to be accompanied the statutory disciplinary and grievance procedures will not apply until the Secretary of State invokes the power to apply the procedures to workers. The possible extension of employment rights beyond the narrow confines of "employees" is currently being considered. The government has announced a review, under S.23 Employment Relations Act 1999 which enables employment rights to be extended without the need for primary legislation. We will keep you abreast of developments.

## IT AIN'T FAIR: Procedural fairness in unfair dismissal (Section 34)

The Act introduces a new section 98A of Employment Rights Act: the cornerstone of unfair dismissal law.

A dismissal in breach of the new statutory DDP would be automatically unfair (which is welcome). Furthermore an ET will be able to award compensation of 4 weeks' pay for such dismissals "unless it considers that such an award would result to an injustice to the employer".

However, the Act undermines the impact of the House of Lords decision in **Polkey v AE Dalton Services Ltd** [1988]. This means that it is no longer unfair for an employer to dismiss without following a fair procedure, where the employer can show:-

- the employer followed the statutory procedure
- the employer would have decided to dismiss anyway had they followed a fair procedure.

Existing case law on unfair dismissal focuses on the reasonableness of an employer's investigation and procedural steps in relation to the reasonableness of the employer's decision to dismiss. There is the danger that these new provisions will reduce the incentive on employers to carry out a proper and fair investigation.

Where the employer has followed the statutory procedure, a failure to follow the employer's own procedure will not of itself make the dismissal unfair. The

employer must show that he would have decided to dismiss the employee if he had followed his own procedures.

It is already extremely difficult to win unfair dismissal cases. It is necessary to show that the decision to dismiss fell outside the "band of reasonable responses". In other words, that no reasonable employer could reasonably have dismissed: a very strict test. It will now be very difficult to win cases where the employer can show that the statutory procedure has been followed.

This is particularly so as all an employer will need to show (see Section 34(2) proposed new section 98A(2)) is "that he would have decided to dismiss the employee if he had followed the procedure". The effect of this provision is likely to be more examples of employers dismissing after following only the statutory minimum procedure without following existing agreed procedures and will consequently result in more tribunal cases. It could therefore be counterproductive to the stated aim of reducing tribunal cases by aiding the in-house resolution of disputes.

The Regulatory Impact Assessment with the Bill anticipates benefits to employers of between £4 – £6 million per year through "transfers from employees due to changes in the structure of tribunal outcomes"! That is one way of describing a change which means employees will lose more cases and employers will win more! A saving of £6 million when average unfair dismissal compensation is in the region of £2,500 would imply that each year 2,400 employees who would win under the current system would lose after the changes.

## STATEMENT OF PARTICULARS

The Act also introduces new provisions relating to the statement of particulars employers are required to produce.

### Particulars of procedures relating to discipline or dismissal (section 35)

This adds a requirement that the note about disciplinary procedures which should be supplied with the statement of particulars must specify the procedure for discipline/dismissal or refer the employee to a document reasonably accessible to the employee.

The procedure must also specify the person to whom an employee can apply if they are dissatisfied with the decision to dismiss. The general requirements to the statutory procedures provide that in the case of appeal meetings the employer should be represented by a more senior manager.

### Removal of exemption for small employers (section 36)

This means that all employers must provide details of discipline and grievance procedures. The exemption for employers with fewer than 20 employees is removed.

### Use of alternative documents to give particulars (section 37)

The duty on employers to provide a statement of particulars will be met if the contract of employment or letter of engagement supplies the information required for statement of particulars.

These documents can be given before employment starts or within two months of commencement.

### Failure to give statement of employment particulars (section 38)

At present there is no financial penalty against an employer who does not provide employment particulars or who provides inaccurate employment particulars. Lack of sanction leads to lack of compliance and at last the Employment Act partly plugs this gap.

Where the applicant succeeds in an ET claim and the employer is in breach of the obligation to provide a statement (i.e. has provided no statement, an inadequate statement or has not notified changes), the ET shall:-

- if no other award on the claim itself, order two weeks pay (for complete failure) or one week's pay (inadequate statement or not notified change);
- if another award is made, shall increase an award by a minimum of the above figures or 5% of the award, whichever is greater and may increase by up to 25%.

Where there is an increase for failure to follow procedures the total increase may not exceed 50%.

The amounts are to be applied before reductions for contributory fault or redundancy payments in excess of the basic award (Section 40).

The statutory cap on the week's pay applies and there is no free standing right to claim compensation for a failure to provide a statement which is unfortunate.

An employee can only get compensation where they have already lodged a claim for another matter. It will be important to include this in any employment tribunal claim where the employee has not been given a statement of particulars, where no changes to the statement have been notified or where the statement is inadequate, for example, it does not include reference to the statutory or disciplinary grievances.

# Union Learning Reps etc.

**Part 4 of the Employment Act, appropriately named Miscellaneous And General, is the sweeper part with all the remaining provisions. It includes the introduction of the important concept of Union Learning Reps, and the right to request flexible working for those with child rearing responsibilities. We have included the flexible working provisions on page 4 as it forms part of the family friendly provisions.**

## Equal pay: questionnaires
### Section 42

The Bill provides for questionnaires to be used in equal pay claims and amends the Equal Pay Act 1970 by introducing a new section 7B into that Act. The questionnaire procedure is often used in sex, race and disability claim in tribunals. There is often difficulty in getting pay details of male staff which is vital in an equal pay claim. Where the union is recognised this can be available through the disclosure of information provisions of the Trade Union and Labour Relations (Consolidation) Act, but in non-unionised workplaces this right is not available. An applicant has to commence proceedings to obtain the details to help her establish her claim. The government's objective in introducing a questionnaire procedure in equal pay claims is to try and reduce the gender pay gap.

Section 42 gives the Secretary of State the power to prescribe forms that may be used by the complainant in seeking the information and the employer in responding. There may also be a time limit set down within which the questions and replies must be served. The suggestion is that an eight week period would be reasonable for an employer's response. In the context of sex, race or disability claims there is no time limit for replies.

As with sex, race or disability questionnaires, the questions and any replies may be used in evidence before any hearing. If a respondent deliberately or without reasonable excuse, fails to answer the questions within the time limit, or answers them in an evasive or equivocal fashion, the tribunal may draw any inference which it considers just and equitable, including an inference that an employer has contravened and equality clause.

## Union Learning Representatives (ULRs)
### Section 43

The Act creates a new title: ULRs – employees who are members of an independent trade union recognised by their employer and accredited by their union as a learning representative.

ULRs will have the right to reasonable paid time off for carrying out the following activities:

- analysing learning or training needs,
- providing information and advice on learning and training matters,
- arranging learning or training, and
- promoting the value of learning or training,

Paid time off will also be available to consult on these issues with the employer and, thirdly, to prepare for any of the above activities.

The union is required to give notice to the employer in writing that the employee is a ULR and for the rights to apply, the "training condition" must be met by the ULR. The training condition is that the ULR has undergone sufficient training to enable him or her to carry on the activities stated above and that the trade union has given the employer notice in writing of that fact.

This new right is necessary because lay ULRs do not satisfy the definition of trade union "official" who ordinarily have the right to take paid time off work for official trade union duties and training.

ULRs will be able to protect their exercise of these rights by bringing a claim to a tribunal which may award such compensation as it considers is just and equitable. Where any employee is dismissed for exercising any of the new statutory rights, Section 104 of the Employment Rights Act 1996 will provide that the dismissal is automatically unfair.

The Act also enables ACAS and the Secretary of State to issue Codes of Practice as guidance for the practical application of new rights, although as yet no Codes have been drafted.

It is thought likely that they will follow the same pattern as time off for trade union officials.

Unfortunately the rights will not assist employees in non-unionised workplaces where the promotion of training and need for genuine dialogue about training needs is likely to be greatest.

## Dismissal procedure agreements
### Section 44

The right to bring a complaint of unfair dismissal to an Employment Tribunal can already be excluded where there is an approved "dismissal procedures agreement" between the parties. The Employment Rights Act 1996, section 110 gives the power to the Secretary of State to approve such an agreement if it meets certain criteria. Currently the criteria include that the agreement provides remedies that are on the whole as beneficial as those provided for an unfair dismissal claim at tribunal. It is a little used provision at present with the Electrical Contractors Association being one of the few schemes in operation.

Section 44 of the Bill gives the power to the Secretary of State to add to the current criteria. This is to ensure that the agreements comply with the Human Rights Act 1998.

## Fixed Term Work
### Section 45

The Bill gives the Secretary of State power to make regulations to prevent less favourable treatment of employees on fixed term contracts as compared with permanent employees and prevent abuse arising from the use of successive fixed term contracts. The regulations are designed to implement EC Directive No.99/70 concerning the framework agreement on fixed term work. Originally due to be implemented in July 2001, delayed after the first round of consultation until 10 July 2002 and now after a second round of consultation further delayed until October 2002.

The first draft of the regulations excluded pay and pensions from the ambit of the regulations. After vigorous lobbying by the Trades Union Congress and education unions in particular, the second draft includes both. A detailed analysis of the draft regulations is in *LELR* 67, February 2002, pages 6-7.

Disappointingly the regulations still only apply to "employees" narrowly defined as "an individual who has entered into or works under…. a contract of employment" not the wider definition of "worker" to which other European legislation applies, for example the Working Time Regulations 1998. But with the government announcement of a review of the definition of employee in July, under S.23 Employment Relations Act 1996, there is opportunity for change in this area.

There is also a view that limiting the application of the regulations to employees is in breach of the European Directive.

The Regulations will specify the circumstances in which fixed term employment is to have effect as permanent employment and the classes of persons taken to be fixed term and permanent employees.

In Northern Ireland, the power to make regulations implementing the Fixed Term Work Directive is given in Northern Ireland to the Department of Employment and Learning. The regulations otherwise follow the scheme adopted for section 45 above.



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