

Employment law change still has a sting in its tail



Donna Reynolds

APRIL brought a welcome change to employment law with the repeal of the statutory disciplinary and grievance procedures.

However, many employers are already finding to their cost, that the statutory procedures may be in their death throes but are not yet dead.

Rather, they still potentially lurk behind every employment dispute where a "trigger event" took place before the cut-off dates provided for in the transitional provisions between the statutory procedures and the Acas code of practice.

This matters because, where statutory procedures still apply, compensatory awards may be subject to an uplift of up to 50 per cent if they are breached.

The transitional provisions for disciplinary and dismissal cases are relatively straightforward. Where the employer had started, or taken the disciplinary or dismissal action, on or before 5 April, the statutory disciplinary procedure will apply.

Unfortunately, matters are not so straightforward for grievances. If all of the acts or omissions about which the employee complains took place before 6 April, the statutory procedure will apply.

Similarly, that procedure will apply to acts or omissions beginning on or before 5 April if they continue beyond this date and the employee has submitted a written grievance or a tribunal claim on or before 4 July (if it relates to a claim with a three-month time limit) or 4 October (if it relates to a claim with a six-month time limit).

Employers could be forgiven for believing that they must now be dealing with all but the last of the grievances or tribunal claims to arise under the statutory procedure - 4 July was the cut-off, and the majority of cases have a three-month time limit for lodging with the tribunal.

The employers' preference for the new procedures is easy to understand given the potential uplift under the old procedure is greater than possible under the Acas code.

However, there is another trap for the unwary. The new section 24(2) of the Employment Rights Act 1996 allows tribunals, in addition to ordering the payment of an amount equal to any unauthorised deduction from wages, to order an employer to pay to the worker (note the wider category of individual than employee) compensation to reflect

any loss suffered as a result of the unauthorised deduction.

This will also apply to the non-payment of redundancy pay. Therefore, in certain circumstances, a worker can delay his grievance or tribunal claim to benefit from this provision.

The compensation will be an amount the tribunal considers "appropriate in all the circumstances" and is intended to compensate workers for all losses. For example, it is envisaged additional bank charges and interest charges will be recoverable.

As a result, the extent of the claims workers may bring will certainly be the subject of much litigation, as will the meaning of "appropriate in all the circumstances".

To take what many might see as an extreme example, would it be appropriate to compensate a worker who has had his house repossessed because an employer wrongly deducted money from his wages and, as a result, he could not pay his mortgage?

Open questions until cases give guidance might include: how much consideration will be given to other contributing factors, how directly related the loss is to the employer's act, and what steps must the worker take, if

"The employers' preference for the new procedures is easy to understand"

any, to mitigate those losses?

No doubt, employers will come up with creative arguments against any alleged link between non-payment and any losses suffered, but we will also see an new impetus on when a person is employed, as opposed to self-employed, given that individuals, who may have previously accepted their self-employed status, may now try to take advantage of the more generous statutory scheme.

One thing is very clear: employers must, first, treat any letter from an employee containing a complaint about their actions as a grievance - even if there is no apparent intention at that stage to pursue the matter.

And secondly, seek advice if they are in any doubt about the procedure to be followed.

The risk of not proceeding cautiously is an unintentional breach of the statutory procedures.

With regard to minimising the risk of being ordered to compensate the worker for his losses, employers must ensure the contract of employment authorises the deduction in question before the event which triggers the need to make the deduction.

● Donna Reynolds is a solicitor with CCW Business Lawyers