

Application of the Dismissal and Disciplinary Procedures (“DDPs”)

1. The DDPs¹ apply, subject to certain exceptions, when the employer contemplates dismissal or taking “*relevant disciplinary action*”. (Reg. 3)
2. Relevant disciplinary action means action short of dismissal based on **conduct or capability** other than suspension on full pay or oral or written warnings (Reg. 2)

Examples: -

- Employer considers requiring employee to present Dr.’s certificates for all future sickness absences – DDPs engaged.
 - Employer suspends employee on full pay pending investigation of allegation of serious misconduct. Misconduct quickly proves to be less serious and the employer imposes written warning – DDPs **not** engaged.
 - Extending a probationary period - DDPs engaged.
 - Introducing a monitoring system of the employee’s performance - DDPs engaged.
3. Whereas relevant disciplinary action relates to conduct or capability, the DDPs apply, subject to certain exceptions, to all dismissals.

The exceptions: -

- Constructive dismissals (Reg. 6)

¹ This presentation will not cover the Modified Procedure at Chapter 2 Part 1 Sch 2 EA 2002 and reference to the DDPs are to the Standard Procedure at Chapter 1.

- Certain dismissals followed by re-engagement (Reg. 4(1)(a))
- Certain collective redundancies (Reg. 4(1)(b))
- Certain strike or industrial action dismissals (Regs 4(1)(c) and 4(1)(d))
- Sudden cessation of employer's business (Reg. 4(1)(e))
- Continued employment would contravene duty or restriction (Reg. 4(1)(f) – n.b. this is the only exempted dismissal that is one of the potentially fair ones under S. 98(2) ERA 1996. See also ***LB Hounslow v Klusova* UKEAT 0325/06**
- Designated dismissals procedure in force (Reg. 4(1)(g))
- Retirement (Reg. 4(1)(h) recently inserted by para 64 Sch. 9 *Employment Equality (Age) Regs 2006*)

Compliance

4. The question of compliance with/completion of the DDPs is likely only to be a practical issue in 3 circumstances: - in relation to unlawful deduction from wages (as above), where the disciplinary action (as defined) and/or dismissal is said to be an act of detriment or discrimination under certain jurisdictions, and in relation to unfair dismissal. It is likely that the overwhelming majority of cases met in practice will relate to unfair dismissal (as is probably foreshadowed in Part 3 of the **Explanatory Note** to the EA 2002.) Note: there is no freestanding claim available for breach of the DDPs, and breach of them will only be an issue if it relates to an

available cause of action – see **Scott Davies v Redgate Medical Services UKEAT/0273/06**.

5. The consequences of non-compliance with the DDPs are an uplift to an award under S. 31(3) of the EA 2002, and in the case of a dismissal, a finding of automatic unfair dismissal under S. 98A ERA 1996. In both cases sanction follows “non-completion” of the DDPs. The interpretation regulation (Reg 2) of the 2004 Regs is singularly unhelpful on the question of what “non-completion” means.
6. The first cases on the EA 2002 procedures related to the GPs, and it soon became clear that the EAT urged a non-technical approach to what constituted compliance with the GPs. In the first case on the DDPs the approach was the same.
7. In **Silman v ICTS (UK) Limited UKEAT/630/05** Elias P pointed out in para. 22 that

“The purpose of these procedures is to ensure that there is a proper and fair opportunity for the parties to seek to address any disciplinary issues and other matters which may lead to dismissal prior to the matter ending up in litigation before the Employment Tribunal. It is not to create unnecessary technical hurdles for either employer or employee.”

He acknowledged the workplace reality that investigations often throw up new lines of inquiry and evidence may emerge of disciplinary conduct that is a variation on that first investigated. He added later in the same para.

“Shifts in the focus of the case will not lead to an obligation for the employer to write fresh missives on each occasion. Of course, there will be cases where the employer wishes to deal with a quite distinct act of misconduct which has emerged at some stage as a result of the disciplinary or investigative process for earlier alleged acts of misconduct. In those circumstances, it would be

necessary to comply with the procedures, so that the employee knows in advance precisely what case he has to meet, to send a fresh statement in writing.”

8. Elias P expanded on this in ***Alexander v Bridgen Enterprises Ltd [2006] IRLR 422***. This is very much the leading case on the DDPs, and in it the EAT laid down some guidance on points of general approach, and went into some detail as to what is required to comply with Steps 1 and 2 of the DDPs.
9. He echoed the approach in the GP authorities and the Explanatory Note to the EA 2002 at paras 34 and 35 of his judgment

First, the purpose of these statutory procedures is to seek to prevent the matter going to an employment tribunal if possible by providing the opportunity for differences to be resolved internally at an earlier stage: see the observations in the Canary Wharf case, paragraph 24...and

Second, these procedures are concerned only with establishing the basic statutory minimum standard. It is plainly not the intention of Parliament that all procedural defects should render the dismissal automatically unfair with the increased compensation that such a finding attracts. They are intended to apply to all employers, large and small, sophisticated and unsophisticated. They are not intended to impose all the requirements breach of which might, depending on the circumstances, render a dismissal unfair. This suggests that the bar for compliance with these procedures should not be set too high.

10. At para 38 he deals with Step 1:

At the first step the employer merely has to set out in writing the grounds which lead him to contemplate dismissing the employee, together with an invitation to attend a meeting. At that stage, in our view, the statement need do no more than state the issue in broad terms. We agree with Mr Barnett that at step one the employee simply needs to be told that he is at risk of dismissal and why. In a conduct case this will be identifying the nature of the misconduct in issue, such as fighting, insubordination or dishonesty. In other cases it may require no more than specifying, for example, that it is lack of capability or redundancy.

11. Step 2 at para 39:

It is at the second step that the employer must inform the employee of the basis for the ground or grounds given in the statement. This information need not be reduced into writing; it can be given orally. The basis for the grounds are simply the matters which have led the employer to contemplate dismissing for the stated ground or grounds. In the classic case of alleged misconduct this will mean putting the case against the employee; the detailed evidence need not be provided for compliance with this procedure, but the employee must be given sufficient detail of the case against him to enable him properly to put his side of the story. The fundamental elements of fairness must be met.

12. **Alexander** is the leading case, and the others seem to fit around it. In **Draper v Mears [2006] IRLR 869** the question of compliance with Step 1 was at issue. In it the EAT held that tribunals should consider the question of compliance with Step 1 separately from Step 2, and that a defective Step 1 letter cannot be regarded as complying with the DDPs simply because the employer complied with Step 2. However, if there is any doubt or ambiguity about whether the document complies with Step 1 the tribunal “*is entitled to look at the whole context in order to resolve any such ambiguity or any such doubt*”. In other words the document is not to be looked at in a vacuum, but in the context of what the employee knew, perhaps from the content of witness statements, discussions etc.

13. Other cases counsel against focussing too narrowly in assessing compliance. In **Kennedy v A to B Travel UKEAT/0341/06** the employee was suspended without pay (relevant disciplinary action) without a Step 1 letter having been sent to her. This was clearly in breach of the DDPs. However, subsequently she received a Step 1 letter, attended a Step 2 meetings, and after her dismissal was invited to and attended a Step 3 appeal. The ET held the suspension to have been in breach of the DDPs and therefore rendered the dismissal automatically unfair. Reversing this the EAT held –

the relevant question for the purpose of s. 98A is whether the procedures have been completed “in relation to the dismissal”.... S. 98A is concerned with unfair dismissal, and s-s. 1 (a) focuses attention specifically on whether the procedures apply “in relation to the dismissal”. The fact that there has been a failure in relation to a distinct disciplinary step, namely suspension without pay, ought not to have any bearing on the question of whether the procedure has been completed in relation to the matter complained of, namely dismissal.

The EAT considered whether a suspension without pay in breach of the DPPs might render a dismissal automatically unfair in the case of **Masterfoods v Wilson UKEAT/0202/06** and considered that it could. This part of the decision was clearly *obiter* and also wrong.

14. In **YMCA Training v Stewart UKEAT/0332/06** the EAT again considered the focus in assessing compliance and Underhill J observed at para 17 that “[h]aving examined the issue above with some minuteness, it is worthwhile to step back and look at it in the round”.

The interrelation of the statutory procedures with the employer’s own internal procedures

Redundancy

15. The DPPs look at first blush more like capability or conduct procedures than anything else, and it is sometimes difficult to shoehorn other types of dismissal into them. The obligations inherent in a redundancy dismissal, especially, do not seem to fit easily. Thankfully guidance comes from **Alexander**.
16. Step 1 is straightforward, see my para 9 above, Step 2 is a different matter, at paras 40 - 46.

In redundancy dismissals the issue is more difficult, not least because there are two stages in the process. First, the employer has to decide that he is going to implement dismissals on the ground of redundancy. That is a decision which will generally be taken independently of the particular employees to be selected.

Thereafter, absent at least sufficient volunteers, there will need to be the second stage at which particular employees are selected and compulsorily dismissed.

... In our judgement, the reference in step two to 'the basis for including in the statement ... the ground or grounds given in it' requires that an explanation is given as to why the employer is contemplating dismissing that particular employee. It is, after all, the contemplated dismissal of the specific employee which is in issue and may lead to tribunal proceedings, not just the decision that certain jobs will have to go. In a redundancy context, that will involve providing information as to both why the employer considers that there is, to put it colloquially, a redundancy situation and also why the employee is being selected. The latter is, in practice, likely to be far more important to an employee than the former. In general, employees will not individually be in a position to make any cogent observations about an employer's conclusion that redundancy is necessary, although sometimes the information provided may raise a question as to whether redundancy is the genuine reason for the dismissal. But more pertinently, the employee will want to make representations about his own selection and, of course, he will be in the best position to make observations about that.

... We think that it is clearly necessary that the employer, in order to comply with step two, should in advance of the meeting notify the employee of the selection criteria. Without that information, it is impossible for the employee to give any sensible response to the proposed decision at all.

... In our judgment in order to comply with the statutory provisions an employer should provide to the employee not only the basic selection criteria which have been used, but also the employee's own assessment. That will give the employee an opportunity to make representations not only about whether the criteria are justified and appropriate but also, more importantly, whether the marking given to him in respect of any particular criterion is arguably unjust, and why. It may be that he can correct some obvious factual error, such as being attributed with a disciplinary record he does not have, or what appears to be a rogue mark on one of the criterion, apparently wholly out of line with his work performance. His response will be difficult to formulate, and very much in a vacuum, without this information.

Other

17. As pointed out, the DDPs apply to all employers, big and small, sophisticated and rough and ready; many will have procedures which have not been modified to accommodate the provisions of the EA 2002.
18. Sometimes the internal procedures are incompatible with the DDPs, for example, in **Masterfoods v Wilson** (above) the employer's procedure obliged the employee wishing to appeal a decision to set out their grounds. The employee failed to do this and was refused an appeal. Step 3 contains no such requirement for grounds – if the employee informs the employer of his wish to appeal then the employer must invite him to an appeal. The dismissal was automatically unfair under S. 98A.
19. Sometimes it is hard to fit the application of an employer's procedure into the DDPs, and terminology can confuse things. In **YMCA Training v Stewart** (above) Underhill J observed at para 9:

But it is crucial in cases of this kind for tribunals not to be distracted by the fact that the parties may have been following an internal procedure with more elaborate requirements and different terminology from those required by the statute: it is necessary to look beneath the parties' own labels and focus on whether the substantive requirements of the statute, which are in simple and non-technical terms, were or were not in fact met.

20. It can happen that there is an overlap between internal procedures, such as a hearing to consider both a disciplinary matter and a grievance. The EAT has held that it does not matter if other matters were on the agenda at a meeting claimed fulfil a Step 2 meeting under the DDPs, even though the meeting was originally requested to deal with matters unrelated to the dismissal and disciplinary process (**Patel v Leicester City Council** **UKEAT/0368/06** para28).

Stephen Heath
Tanfield Chambers
stephenheath@tanfieldchambers.co.uk
Tel: 0207 4215300