SUBMISSIONS OF THE EMPLOYMENT LAWYERS ASSOCIATION TO THE REVIEW OF MR MICHAEL GIBBONS FOR THE DTI

5TH MARCH 2007

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INTRODUCTION AND SUMMARY

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of Employment Law and includes those who represent both Claimants and Respondents in the Courts and Employment Tribunals. It is not, therefore, ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

At its annual conference in May 2006, ELA published the findings of an extensive survey that it had carried out amongst its membership into the workings of the new Employment Tribunal Rules of Procedure, and the new Statutory Dismissal and Disciplinary/Grievance Procedures. A copy of the survey is attached [Appendix 1]. Its findings made clear that there was widespread unhappiness about the operation of the new Rules and Procedures. Considerable publicity was given to the ELA survey at the time and it was referred to widely in national newspapers, and in the professional employment press.

The DTI was present at the annual conference, and ELA was immediately invited to discuss our findings in more detail with those who were at that stage responsible for dispute resolution reform. The meeting duly took place in June 2006.

The team responsible for this area at the DTI then changed, and there would appear to have been a rethink at policy level, such that in December 2006 Michael Gibbons was appointed by the Secretary of State, to review options for improving our system of Employment Dispute Resolution. His timetable has been very short, and we understand he is due to report in the Spring.

ELA, whose members specialise in Employment Law, and therefore involve themselves in the business of Employment Dispute Resolution on a "day by day" basis, have formed a working party to come forward with their recommendations to Michael Gibbons for his consideration, when he comes to formulate his proposals in the coming weeks.

Members of our working party and the sections of the paper for which they were principally responsible are:

Richard Fox of Kingsley Napley (Chair) – Introduction & Summary and Fixed Periods for Conciliation

Elaine Aarons of Withers – "Without Prejudice" discussions

Susan Belgrave of 9 Gough Square – "Without Prejudice" discussions

Emma Burrows of Trowers & Hamlins – Fixed Periods for Conciliation

Paul Daniels of Russell Jones & Walker – Statutory Disciplinary Procedures

Philip Harman of Cobbetts – Statutory Grievance Procedures

Paul Statham of Pattinson & Brewer – Acceptance of Claim/Response Procedure

Alison Wetherfield of McDermott Will & Emery – Statutory Disciplinary Procedures

Barry Clarke of Russell Jones & Walker and John Evason of Baker & McKenzie have also made valued contributions as Chair of ELA and Chair of ELA's Legislative & Policy Sub-Committee respectively.

In summary, and in relation to the following principle areas, our recommendations are as follows:

Statutory Disciplinary Procedures

1. Under the current regime, an employer's failure to comply with the statutory disciplinary procedure leads to serious consequences, for it will mean that there is a

finding of automatic unfair dismissal. Whilst it may be accepted that the EAT has sought to ensure there is a simple, non-technical approach to considering whether the minimum procedure has been fulfilled, given the seriousness of the sanction if it is not, we believe attention should focus upon whether the minimum procedure is in fact sufficiently clear, and comprised of the correct components, such that it is right that an employer who fails to comply, will find himself liable to the sanction of automatic unfair dismissal.

2. As things stand employers may have real concerns that they may be deemed to have automatically unfairly dismissed their employees through breach of the statutory requirements, which requires them to assess what exactly is "reasonable", in the context of matters such as "delay", "timing" or "location".

3. One idea may be to "decouple" the sanction of automatically unfair dismissal, from the "subjective" aspects of the process. A finding of unfair dismissal could be confined to cases in which an employer has failed to send a step 1 letter or set up a meeting after an appeal (and possibly also where an employer has failed to provide the basis for the contemplation of a dismissal or other relevant disciplinary action). As to assessment of what occurred next in the process, this could remain of relevance to a Section 98 (4) (of the Employment Rights Act 1996) enquiry. (*i.e. an assessment on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, which will be determined in accordance with equity and the substantial merits of the case*).

4. For some the decision in *Masterfoods v Wilson* highlights the issue. In that case an employer faced a finding of automatic unfair dismissal, notwithstanding the fact that it was prepared to allow an appeal, but sought to have the employee comply with the requirements of its contractual scheme, (*whereby for an appeal the <u>grounds</u> needed*

to be set out). Because that was not a requirement of the statutory scheme, however, the employer was found to be in breach. That having been said, ELA would not argue with the fact that an Employment Tribunal should be able to consider the adequacy of an appeal, or indeed the lack of one. The question is, however, whether a mere breach of statutory procedure of this sort, should give rise to a finding of automatic unfair dismissal. (Another issue may be whether the requirement to hold an appeal would sit side by side with an obligation on the part of the employee to provide in writing, the grounds for the appeal).

5. Where automatic unfair dismissal is found, we currently have no statutory guidance for the Employment Tribunal in assessing compensation, beyond the minimum sanction of a 4 week award.

6. Indeed the amount of any compensatory award can vary enormously from case to case, despite the fact that the breach of the statutory disciplinary procedure may be effectively the same. Thus, if the sanction is to be applied for a failure to send a step 1 letter, the financial consequences are in many respects wholly outside the employer's control (*because they may depend upon factors such as the extent to which an employee is able to find another job*). Thus, the same breach in two different cases may result in an award at the level of 4 weeks only on the one hand, or many thousands of pounds on the other.

7. The range of percentage adjustment has another consequence, namely that it greatly expands the "bid – offer spread" in any "without prejudice" discussions that may be held with a view to settlement. It serves to encourage Claimants to focus on any small procedural flaws that there may have been, and Respondents to focus on Claimants' non compliance in any small particular.

8. As an alternative, legislation or guidance could set out a list of factors which could assist Employment Tribunals in exercising their discretion in awarding an uplift of between 0 and 50 per cent. Such guidance might include:

- *The size and administrative resources of the employer.*
- *The seriousness of the failure (and number of steps failed).*
- *Prejudice to the employee, if any.*
- *Reasons for any failure.*
- *Extent to which the employee has contributed to this.*
- *Whether there was a reasonable belief that the other side was not acting in good faith/with an open mind.*

9. Another alternative could be to have a sliding scale of the sort that applies in relation to protective awards for procedural failures in collective consultation situations. A range of, say, 4 to 13 weeks, could apply for breaches of the minimum procedure, with Tribunals applying a list of factors of the type set out above, to guide their approach within the range.

Statutory Grievance Procedures

10. In our view Statutory Grievance Procedures have failed to assist in the resolution of work place disputes at an early stage, without recourse to litigation. They have made disputes more formal, more complex, and more legalistic. On that basis we would return to the position pre October 2004, and do away with Statutory Grievance Procedures altogether. The pre-October 2004 position still puts an onus on employers to follow internal grievance procedures to minimise the risk of claims of constructive dismissal and discrimination.

11. If the view is taken that there is nonetheless merit in seeking to encourage (via Statutory Grievance Procedures) the resolution of disputes internally without the resort to litigation, we believe there would have to be a thorough re-examination of the inter relationship between the Rules set out in the Employment Act of 2002 and the accompanying Employment Act 2002 (Dispute Resolution) Regulations of 2004, with the case law that has now been decided since the introduction of these Rules.

12. Section 32 of the Employment Act 2002 in particular, which compels an employee to lodge a grievance and wait 28 days before bringing Employment Tribunal proceedings, should be abolished.

13. The widest possible interpretation is currently being given by the Courts to the question of what constitutes a "grievance" under the new Rules. Of course if Section 32 is abolished, that will no longer be an issue in the context of the tribunal jurisdiction to accept a claim. However, if it remains, and in any event in the context of arguments on uplifts/reductions in compensation, the way the current Rules are being interpreted means that employers are having to commence formal grievance procedures in response to virtually every written complaint from an employee. This is not, we believe, an effective use of resources. In our view if the Statutory Grievance Procedure process is to be retained, it should only be brought into operation when it is clear from open correspondence, that that is what the employee wants (e.g. by confirming expressly that they are raising a formal grievance and giving the employee the opportunity to withdraw the grievance). In addition if Section 32 is not abolished, consideration should be given to introducing a mechanism to ensure tribunals adopt a consistent approach in deciding whether claims can be accepted upon an employee's failure to follow the procedure. Currently some tribunals accept the claims whilst others apply a stricter approach.

14. Alternatively, and again if the decision was taken to retain Section 32, we would recommend that the precise meaning and purport of Section 32(6) is clarified. At

present (and post cases such as *DMC Business Machines v Plummer EAT/0381/06*) the extent to which it is open to an employer to complain that an employee is barred jurisdictionally, from proceeding with his claim because he did not comply with the provisions of Section 32, if the employer did not raise the point at the time the ET3 was filed, is unclear.

15. As with Statutory Dismissal Procedures, the powers to increase or decrease awards under Section 31 (of the Employment Act 2002) can give rise to substantially different results, and regionally there is evidence of considerable variation in approach. The process should be more standardised and predictable. In this respect, clear guidance might be given to Employment Tribunal Chairman.

16. The Rules relating to extension of time limits contained in Regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 are over complicated and should be substantially simplified. (For example the present confusion as to whether Regulation 15 has effectively superseded the "just and equitable" test which tribunals previously used pursuant to the discrimination legislation, to decide whether or not to allow claims to proceed which would otherwise have been out of time, is wholly unsatisfactory).

17. We suggest, the automatic three month extension of time, which applies for Statutory Grievance Procedures should be repealed, and replaced with a provision which mirrors the Rules that apply to Statutory Disciplinary Procedures. Another alternative is to reduce the extension of time to one month, or to enhance the powers of the tribunal to grant a stay of proceedings pending completion of the internal grievance procedure.

18. The relationship between Statutory Grievance Procedures and Statutory Disciplinary Procedures is wholly unsatisfactory, and far too difficult to determine in practise. We

suggest that where a grievance relates to a free standing complaint unconnected with any issue being determined by the Statutory Disciplinary Procedure, then the Statutory Grievance Procedure should always apply. Otherwise, where a grievance relates to an issue being determined as part of the statutory disciplinary procedure process, the statutory disciplinary procedure should take priority.

19. The workings of the Modified Statutory Grievance Procedure also needs to be reviewed. Once an employment relationship comes to an end, there is, in our view, no practical reason why an outstanding dispute should not be resolved by correspondence. At the moment the process is often being used for tactical purposes by employers and employees. In our view, the modified procedure should be made to apply whenever there is a grievance outstanding, after the end of the employment relationship (whether raised prior to or after the termination) unless both parties agree otherwise.

Acceptance of Claim/Response Procedures

20. Eighty one per cent of those who replied to our survey did not believe it was appropriate to deny employees access to the Employment Tribunal because of incorrect compilation of the claim form, and 66 per cent believed it was inappropriate for employers to face the possibility of a default judgement being entered against them, or to be denied the opportunity of taking part in proceedings, simply because their response was not accepted by the Employment Tribunal.

21. We have seen some ridiculous situations since the introduction of the new Rules where claims have been refused because the wrong form was used (such as Laser forms, rather than the official form, even though they were identical) or because the faxing of the form reduced its size. Fortunately the Employment Appeal Tribunal has had the good sense on such occasions to find ways and means to resolve these

matters, but their having to do so only brings the Employment Tribunal process into disrepute. We do understand why there has been much pressure to standardise the form, in view of the investment in new technology, etc, but the effects of such a requirement have led to disproportionate results. We therefore recommend that the old Rules on acceptance of claims be reinstated, so that a claim would be accepted whatever form is used, but that the Claimant would then be required to complete an official form and provide the compulsory information, before the claim is forwarded to the Respondent and registered (*if further information needs to be forthcoming*).

22. The same principle should apply to a refusal of the Employment Tribunal to accept a response, because the wrong form is used.

23. Guidance should be provided to the Employment Tribunal in order to ensure consistency in relation to the making and setting aside of default judgments.

24. Because of the workings of Section 32 of the Employment Act 2002, employees with complaints are treated differently to workers with complaints. We see no justification for that distinction.

25. If the distinction between employees and workers in that context is abolished, there will then be removed the current difficulty that arises because of the operation of Section 31 of the Employment Act 2002, in circumstances where neither Claimant nor Respondent can be sure that the Claimant is an employee or a worker, and the parties have opposing views on the subject.

26. Further clarification (ideally in supplementary Regulations) will be required in circumstances where employees are bringing multiple claims with overlapping facts, such as where an employee is alleging that he was not appointed because of unlawful discrimination, or that he was unfairly dismissed by reason of unlawful

discrimination but is not otherwise alleging he was subjected to unlawful discrimination during the course of his employment. Similarly, there is an issue with Claimants who believe they have been unfairly dismissed, but who also wish to claim outstanding holiday pay and/or unpaid wages *(which may mean they need to make multiple claims so as to comply, where appropriate, with Section 32).*

27. Consideration should be given to providing further guidance for Claimants who are neither employees, nor workers as such, but who are employees covered by the wider definition contained in most of the discrimination legislation, as they worked under a contract personally to execute any work or labour. Similarly, guidance is required for police constables who have rights to claim unlawful discrimination under the current legislation, being deemed to be employees of the Chief Constable for these purposes, but who are not employees as such.

28. Guidance should also be given to Claimants who allege they have been the subject of unlawful discrimination and/or harassment by a fellow employee, but who are not otherwise complaining about the conduct of their employer.

Fixed Period for Conciliation

29. The vast majority of those who responded to our survey (81 per cent) believe the new fixed periods are not encouraging conciliation, and a large majority (67 per cent) think parties simply treat these periods, not as an opportunity for genuine discussions for the purposes of conciliation, but rather as, in effect, a lull in the proceedings.

30. We therefore believe the case against fixed periods for conciliation is overwhelming.

31. The “short” periods for conciliation, which apply to claims such as unlawful deduction of wages, time off for public duties, and time off for antenatal care, etc, do not take account of the fact that it takes time for ET1’s to filter through appropriate channels in large firms and organisations, and for ACAS to become aware, promptly, of the fact that an ET1 has been issued *(although with modern technology something might be done about this).*

32. The “standard” cases to which the 13 week fixed period applies, are not being helped by the opportunity to conciliate being restricted to the period at the outset of the case. The theory behind this proposal was always, in our view, flawed. Once a matter has left the internal workplace environment, bound for a Tribunal, it is unrealistic to expect parties to be open to being cajoled into settlement negotiations at the beginning of the litigation process. Parties need to assess their respective positions, and this they can only do following exchange of pleadings, disclosure of documents, exchange of witness statements, and compliance with case management directions. This will not occur within a period of 13 weeks from the date a copy of the Claim Form is sent to the Respondent.

33. In addition, there appears to be some inconsistency in the willingness of conciliation officers to extend the fixed period of conciliation in circumstances where negotiations are ongoing.

34. We therefore recommend abolition of fixed periods for Conciliation in their entirety.

35. If fixed periods are, nonetheless, to remain, they should in our view either come at the end of the litigation process (rather than at the beginning), or otherwise at a period determined by the Employment Tribunal at a case management discussion.

36. Consideration may be given to further encouraging parties to take the conciliation process more seriously. For example, letters containing "minimum positions" could be addressed to ACAS, akin to a *Calderbank* or *"without prejudice save as to costs"* process in litigation before the common law courts, and if, allied to more rigorous application of costs awards, may be taken into account by Tribunals, with reference to the final outcome of the case.

37. Depending upon the outcome of the Tribunals, Courts and Enforcement Bill, currently passing through Parliament, the provisions that may relate to mediation, need to be allied to those that may relate to conciliation, so that the opportunities for either process may be made available to the parties at whatever time is deemed appropriate.

38. If the seven week "short" fixed period is to be retained, there should be a duty for ACAS to make contact with the parties early on within that time frame, if the period is to have any effect at all.

39. We also take this opportunity to urge the Government to reflect carefully upon the effect that the cuts to the budget for the service that ACAS provides, may have on their ability to conciliate cases, and thus have them removed from the Employment Tribunal system. In our view, if the budget cuts continue, and the service ACAS is able to provide declines as a result, it may have an increasingly corrosive effect on the confidence of the parties (and those who advise them) to allow ACAS to conciliate their disputes. Given their unrivalled experience in this field over the last 30 years, that would in our view, be most counter productive from the Government's point of view.

"Without Prejudice" discussions in the light of BNP v Mezzotero [2004] IRLR 508 EAT]

40. The BNP Paribas v Mezzotero has become a major stumbling block to alternative dispute resolution in employment cases. It has brought to the fore the fact that *"without prejudice"* communications can only take place where there is a dispute between the parties. Merely because an employee has raised a grievance, does not mean that there is a "dispute" *(the logic being that a grievance may be upheld so that the parties never in fact reach the stage of being in dispute)*. As a result, any communications between the parties, even though expressed to be "*without prejudice" or "off the record*", may nonetheless be referred to in open court. The effect can be serious. An employer may as a result be accused of having in effect constructively dismissed an employee, or of conducting a "sham" of a dismissal procedure if that process is subsequently, or at the same time, undergone. There may also be allegations of "*victimisation*" as a result of what may be said during the course of what an employer may have thought was a "*without prejudice*" conversation.

41. The interaction of the BNP case, with the minimum statutory dismissal procedures has also proved problematic. It is not clear whether negotiations conducted on a *"without prejudice"* basis, can ever take place whilst the minimum statutory dismissal procedures are being undergone. If the employer gets it wrong in this respect, he may be liable for a finding of automatic unfair dismissal and in an increase in the award of compensation, by up to 50 per cent.

42. Whilst the case suggests communications may be held on a "without prejudice" basis if the parties agree, employers often feel it is too risky to seek agreement from an employee in order to negotiate.

43. The result has been that the opportunity for *"without prejudice"* discussions has declined all the more, because of the need to comply with the minimum statutory procedures. If something can be done about this, arguably such a change may have a most significant effect on the number of claims currently being processed through the Tribunals.

44. Accordingly we believe consideration should now be given to providing for the issue of statutory guidance which would outline the circumstances in which it would be reasonable for an employer to initiate *"without prejudice"* discussions. That guidance would explain the nature, purpose and scope of *"without prejudice"* discussions, be readily available to employees, provide that the employees should have a right to be accompanied by a colleague or Trade Union member, advise the employee to seek independent legal advice, and make it clear that the employee can withdraw from negotiations at any time without adverse repercussions.

45. If there is a legitimate concern that "without prejudice" discussions could prejudice employees, the DTI could consider the introduction of statutory forms which an employer could give to an employee inviting the latter to negotiate, akin to the form used in the context of a request for flexible working. In those circumstances, if the request to negotiate was made before completion of the statutory procedure, it would not be taken as pre-judging the employer's or the employee's position. Again, in order to accept the offer to negotiate, an employee might be compelled to consult an independent legal advisor *(as defined in Section 203 of the Employment Rights Act 1996).* There could be a requirement for the statutory form to be signed by both parties, and the independent solicitor, before *"without prejudice"* discussions were entered into. The mere fact that the request to enter into negotiations had been made, again would not raise any presumption that the employee was being victimised, or otherwise discriminated against (although as a matter of public policy,

any harassment, undue pressure or discriminatory comments made in the course of *"without prejudice"* negotiations could be admissible).

46. Similarly an employee seeking to initiate *"without prejudice"* discussions in relation to the termination of his employment should be given a guarantee that such an approach would be privileged and would be treated as being *"without prejudice"*. The requirement to submit a statutory form may be too onerous for employees, however. Making a "*without prejudice*" approach would not mean that an employee will be taken to have admitted to any shortcomings, nor to the fact that there are any grounds to dismiss him.

47. It is accepted that some may take the view that these procedures could be seen to import yet more "red tape" into the process for employers, and undue complication for employees, many of whom may not obviously enjoy the benefit of ready access to legal representation. Arguably, however, this disadvantage is outweighed by the need to avoid the current uncertainties for employers (and employees) and we already force employees into the hands of independent advisers at the end of the process (pursuant to Section 203 of the Employment Rights Act 1996 and equivalent provisions in other employment legislation) in order to complete the process of settlement.

STATUTORY DISCIPLINARY PROCEDURES ("SDDPs")

1. This section focuses on a number of points of concern with the drafting and application of the Employment Act 2002 ("EA") and the Employment Act 2002 (Dispute Resolution) Regulations 2004 (the "Regulations") in so far as they relate to SDDPs. These affect Claimants and Respondents alike.

Automatically Unfair Dismissal

2. Prior to the introduction of the new SDDP regime, the concept of automatically unfair dismissal was well established to deal with certain substantive grounds for dismissal, regardless of the length of service or age of the employee: see sections 98B – 106, 108, 109 Employment Rights Act 1996 ("ERA"). A fair procedure was and is irrelevant to such substantively unfair and unacceptable dismissals. A finding of automatically unfair dismissal is a serious sanction.

3. The SDDP regime takes this concept into a new realm. A fair and acceptable reason for dismissal is irrelevant if the employer has failed to comply with the relevant SDDP (section 98A(1) ERA). The finding of automatically unfair dismissal remains a serious sanction. While the advent of the new procedures were hailed as a partial reversal of Polkey, the exposure of employers to this sanction on procedural grounds alone could also be described as a new elevation of procedure to a greater level of significance than underlying substance.

4. ELA is supportive of a fair and compulsory procedure to protect the interests of both employees and employers. The experience of our members, who include tribunal chairs, is largely positive regarding step 1 and step 2 of the standard SDDP, particularly given the common sense, natural justice focused approach evidenced by

the EAT in cases like Alexander & Hatherly v Brigden Enterprises Ltd, Drapers v Mears and YMCA Training v Stewart. In all these cases, the EAT has commented on the need for a simple, non-technical approach to be taken in considering whether the minimum procedure has been fulfilled.

5. Given the seriousness of the sanction, however, this is a useful juncture at which to consider whether the minimum procedure (a) is sufficiently clear and (b) is comprised of the correct components, such that it is right to punish the employer who fails to comply with any particular of it with the sanction of automatically unfair dismissal.

6. As to clarity, our practical experience is that a number of provisions of the SDDPs and Regulations remain untried and that many employers are very concerned, given the severity of the sanction, about, for example, whether they will be deemed to have automatically unfairly dismissed an employee through breach of a specific or general requirement which requires assessment of what is "reasonable", for example as to "delay", "timing" or "location". This will differ from situation to situation. While the requirement of full disclosure (step 1, step 2) and the requirement of an invitation to a meeting (step 2) are easy to assess on paper, whether an employee or an employer is to blame if such a meeting does not take place will always require a nuanced and more subjective assessment. The labyrinthine provisions of Regulations 5, 11 and 12 – 13 which deem failure or compliance in certain such situations have also hardly been touched upon in existing case law.

7. One frequent problem, for example, is that the receipt of a step 1 disciplinary letter can be stressful and that an employee may immediately secure a sick note from a doctor for stress and anxiety covering the period during which the step 2 meeting was scheduled. While this may not be foreseen at the point of scheduling, and hence Regulation 13(1) may apply, it is not clear whether an extension of such leave is "foreseeable" such that the employer could rely on a scheduling immediately after the

expiry of the first sick note but before receipt of an extension for compliance with the employer duty under Regulation 13(3). At what point can an employer state that a disciplinary/dismissal issue must be resolved, despite the absence of an employee ? No confident advice can be given about this at present.

8. Doubtless case law will start to accrue on these points, but in the interim, further guidance could usefully be given.

9. Thought could also be given, if the DTI is considering the whole concept of the link between procedure and automatically unfair dismissal, to “de-coupling” the sanction of automatically unfair dismissal from the subjective aspects of the process. While the schemes serve different purposes, of course, it is notable that jurisdiction of a tribunal is assured once an employee has filed a grievance letter and allowed 28 days to pass – there is no assessment of the employee’s co-operation in the process unless and until the employee wins the claim, in which case any failure to comply with the full three step procedure is of relevance to compensation. A finding of automatically unfair dismissal could, by the same token, apply only if the employer has not sent a step 1 letter, set up a meeting and offered an appeal (and possibly also where an employer has failed to provide the basis for the contemplation of dismissal or other relevant disciplinary action). Outside these matters, assessment of what occurred in the process would still be of relevance to a section 98(4) analysis of the fairness of the process.

10. We have mentioned step 1 and step 2 above. It is fair to state that some employer clients of some of our members voice frustration with the fact that automatically unfair dismissal results from the failure to carry out step 3, an appeal meeting, even if, on a substantive and procedural basis, there was nothing unfair about the dismissal itself. A number of our members were surprised by Masterfoods v Wilson in which the EAT confirmed that a failure to invite an employee to an appeal meeting was an employer

breach justifying the sanction of an automatically unfair dismissal finding, despite the fact that the employer's reason was the employee's non-compliance with a separate "admirable" contractual disciplinary procedure which required that he specify the grounds of his appeal.

11. While in that case the tribunal had found multiple flaws in the investigatory approach suggestive of bias, the ratio of the case would apply to any employer with a sophisticated contractual appeals procedure which goes beyond the statutory procedures in the area of appeals. This is one area where the penalty of automatically unfair dismissal could certainly unnecessarily and unfairly sanction an employer, which is simply trying to run a procedure efficiently and in accordance with what in the past was good industrial practice, and remains a standard part of most contractual procedures. As it stands post Masterfoods, to avoid an automatically unfair dismissal, the employer must always schedule and carry out a face to face meeting, even if the employee appeals after having left employment or lets many weeks go by before appealing. There is no ability, as there is in the grievance regime, to agree to an appeal in writing.

12. ELA agrees, of course, that there are cases in which a perfectly fair dismissal is rendered unfair by some defect on appeal, and in which some procedural defect at the dismissal level is corrected on appeal. These are matters on which there is extensive case law. The issue here, however, is what should form part of the minimum procedure, applicable in every case. De-coupling of the link between the full carrying out of step 3 and automatically unfair dismissal would not prevent a tribunal from considering the adequacy of an appeal or the lack of one.

13. Another issues that arises, in particular from the Masterfoods case, is whether the right of the employee to appeal could be made dependant on his providing in writing to the employer, his grounds of appeal.

Compensation adjustments

14. Finally, in cases where automatically unfair dismissal is found, ELA has concerns that there is no statutory guidance, beyond the minimum sanction of a four week award, to tribunals in assessing compensation.

15. Some of our members have serious doubts regarding whether the compensation adjustment provisions, which apply purely to the compensatory awards for unfair dismissal and in discrimination cases, are appropriate. While compensatory award adjustments affecting ultimate payments are well established, for example, percentage reductions for contribution, the sort of adjustment introduced here is of a different sort. Even if the same percentage were always to be applied for, for example, knowing failure to send a step 1 letter, the financial outcome depends upon matters entirely outside the employer's control, most notably how long it takes the unfairly dismissed employee to find a job, and how much he or she earned. There seems no good reason why such a blatant breach could in one case result in a four week award only – because the employee concerned suffered no out of pocket loss through effective mitigation and job search, but in another result in an award of thousands of pounds (perhaps taking a £40,000 out of pocket loss to £60,000 with a 50% uplift).

16. Exactly the same failure by an employee or employer to comply with an SDDP can thus have a dramatically different outcome in financial terms. Mitigation is a notoriously difficult matter to investigate at tribunal – the panel has no basis in most cases for anything other than the most rudimentary of considerations of whether a dismissed employee should reasonably have mitigated loss through seeking or accepting new work. Percentage uplifts to compensatory awards could potentially incentivise an automatically unfairly dismissed employee to accrue further loss rather than to move on. Equally, percentage reductions run the risk of excessively

penalising an employee who has suffered genuine hardship and loss due to the vagaries of the employment market after dismissal who perhaps decided not to attend an appeal out of disgust with the process. Despite prevailing on unfair dismissal, they are at risk of losing compensation.

17. In addition, the range of percentage adjustment is sufficiently broad to greatly expand the "bid-offer spread" in any sensible without prejudice discussions of settlement. Claimants will always be advised to focus on any small procedural flaws to base a claim for more than out of pocket loss and Respondents will likewise have an incentive to focus on claimant non-compliance in any small particular to drive settlement offers well below out of pocket loss. The sheer uncertainty of what a Tribunal might award infects the settlement process in addition, wasting time and opportunities to resolve dispute quickly. Again, this is the antithesis of what Parliament intended and ELA would support revisiting the question of how best to incentivise respect for procedure and natural justice.

18. There are two ways to approach this. Legislation or guidance might set out a list of factors to assist employment tribunals in exercising discretion in awarding a 0 to 50% uplift (and negotiating parties to apply in discussion). These should certainly include:

The size and administrative resources of the employer;

The seriousness of the failure (and number of steps failed);

Prejudice to the employee, if any;

Reasons for any failure;

Extent to which the employee has contributed to this;

Whether there was a reasonable belief that the other side was not acting in good faith/with an open mind.

19. Alternatives do also exist, which would reduce the arbitrariness of application of a percentage adjustment to a variable figure, in the form of set sliding scale protective

awards of the sort applicable, for example, to procedural failure in collective consultation. If the SDDP regime is being re-visited, the ELA does not believe that this sanction is the only way to ensure that employers are incentivised to adopt and apply at least minimum procedures and penalised for failing to do so. A range of 4 to 13 weeks could apply for breaches of a minimum procedure, with tribunals applying a list of factors of the sort set out below to guide approach within a range.

STATUTORY GRIEVANCE PROCEDURES ("SGPs")

1. In this section we focus on SGPs and deal in particular with the following issues:

- Should the principle of having minimum standards set out in a SGP's be retained?

  Assuming that the principle is to be retained then the following issues become relevant.

- Should the requirement upon the Claimant to lodge a grievance and wait 28 days before issuing proceedings, section 32 of the Employment Act 2002, be retained?

- What should count as a grievance?

- Should the power to increase or decrease an award for a failure to comply with the SGP's, section 31 of the Employment Act 2002, be retained? If not, what alternative sanction, if any, should exist for a failure to comply with the Statutory Grievance Procedure?

- Should the rules of Extension of time limits, regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, be retained?

- How should the SGP's interrelate with the Statutory Disciplinary and Dismissal Procedures?

- When should the Modified SGP apply?

Should the principle of having minimum standards set out in a Statutory Grievance Procedure be retained?

2. There is a broad consensus that rather than assisting to resolve workplace disputes at an early stage (without recourse to litigation) the SGP's have in fact tended to make disputes more formal, more complex and more legalistic.

3. The evidence of the ELA's survey of members is that 71% of members who participated in the survey said that the SGP's have made no difference upon the resolution of claims. In addition, 92% of members who mainly represent claimants and 99% of members who mainly represent Respondent's said that the SGP's costs their clients more time/money. This evidence clearly suggests that there is very little point in retaining the SGP's at all and that a return to the pre-October 2004 position is warranted. In that respect, it should be recalled that under the "old" regime there was still an onus on the part of the employer to follow internal grievance procedures in order to minimise the risk of claims of constructive dismissal and discrimination.

4. That said, the actual stages of the SGP's set out in schedule 2 are reasonably straightforward. In addition, the principle that employees should be encouraged to try to resolve a dispute internally before litigating is not without merit. The majority of problems have stemmed from the complexity of the underlying rules set out in the Employment Act 2002, the Employment Act 2002 (Dispute Resolution) Regulations 2004 and how those rules have been interpreted by the Courts (often giving a very liberal interpretation to the rules to mitigate against the influence of the rules on the access to justice for employees). If the SGP's are to be retained the underlying rules need to be simplified and clarified.

5. We therefore recommend that the SGP's should be abolished in their entirety. Alternatively, if the principle is to be retained then the underlying rules should be simplified and clarified (see recommendations below).

Should the requirement upon the Claimant to lodge a grievance and wait 28 days before issuing proceedings, section 32 of the Employment Act 2002, be retained?

6. This provision has been the focus of criticism against the SGP's due to the impact it has had on employees' ability to access justice. The rules are complicated and

legalistic. The consensus is that many Claimants – especially those without access to legal representation – have been deterred or prevented from bringing a claim effectively due to the over complexity of procedural rules irrespective of the merits of their substantive claim. In addition, section 32 has dramatically increased the opportunity for Respondents to raise and argue legalistic jurisdictional issues, again irrespective of the merits of the substantive claim.

7. Barring a Claimant from bringing a claim due to a technical failing of a complicated procedural requirement seems totally disproportionate and contrary to the principle of affording access to justice.

8. If Section 32 is nonetheless to be retained, the provisions need to be thoroughly re-examined. For example, the meaning and purport of Section 32(6) needs to be clarified. Post the case of *DMC Business Machines v Plummer (EAT/1038/06*), the extent to which it is open to an employer to complain that an employee can no longer bring this claim because of non-compliance with Section 32, in circumstances where the employer failed to raise the point when filing the ET3, is currently unclear.

What should count as a grievance?

9. The current position is that almost any written complaint, including e-mails etc., can amount to a formal grievance for the purposes of the SGP. The key motive behind this liberal interpretation was the potential adverse impact of section 32 upon the access to justice for Claimants. Provided that section 32 is repealed as recommended in paragraph 3.3 above, this is no longer an issue.

10. The liberal interpretation of what amounts to a grievance has been counterproductive to good employment relations. It discourages employers from attempting to resolve issues informally. Instead it obliges them to commence a formal grievance procedure in response to any written complaint from an employee or risk being penalised at a later Employment Tribunal.

11. The SGP's should be limited to complaints brought by the employee as a formal 'grievance' – ie. where the employee has made it clear in open correspondence that he wants his complaint dealt with under his employer's grievance procedure.

12. We therefore believe the SGP's should only apply where the employee has made it clear that he wishes his complaint to be dealt with under the formal procedure (the employee can also be given the opportunity of withdrawing the grievance). We also believe tribunals should be adopting a more consistent approach in deciding whether claims can be accepted upon an employee's failure to follow the procedure.

Should the power to increase or decrease an award for a failure to comply with the SGP's, section 31 of the Employment Act 2002, be retained? If not, what alternative sanction, if any, should exist for a failure to comply with the Statutory Grievance Procedure?

13. There seems little point in retaining the SGP's at all unless there is some sanction upon employers and employees to ensure that they follow them.

14. The current rules of allowing a 10 to 50% increase or decrease (including the possibility of less than 10% in the right cases) gives the Tribunal considerable discretion. It is also a more effective remedy than, say, simply awarding a flat 2 or 4 weeks pay.

15. However anecdotal evidence is that different Chairman and different regions adopt very contrasting approaches as to what percentage should be awarded. Some Chairmen treat the increase/decrease as a punitive measure (similar to a Protective Award) and take the full 50% as the starting point. Others are adopting a far more conservative approach. Clear guidance is needed as to the factors the Tribunal should take into account when exercising their discretion.

16. We recommend the 10-50% increase/decrease should be retained. However, we believe clear guidance should be provided to Chairmen to ensure consistency.

Should the rules relating to extension of time limits, regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, be retained?

17. The rules contained in regulation 15 are overcomplicated. Different rules apply depending upon whether the SGP's apply or the Statutory Disciplinary and Dismissal Procedures ("SDDP's") apply - thus Unfair Dismissal and Constructive Dismissal are treated differently. Different rules also apply depending upon whether the Claimant is an employee or a worker or, in discrimination cases, a job applicant.

18. In particular, whilst the extension of time permitted where the SDDP's apply and where an appeal is still ongoing at the expiry of the original 3 month time limit has some logic, the automatic 3 month extension for any claim to which the SGP's apply and where a grievance has been lodged seems excessive.

19. Before the 2004 reforms, a tribunal had power to extend time for bringing a complaint of unlawful discrimination, if in all the circumstances of the case it was just and equitable to do so. Regulation 15(1) of the Dispute Resolution Regulations provides for the "normal time limit" to be extended by three months beginning with the day after the day on which it would otherwise have expired. This has now given rise to substantial confusion as to whether Regulation 15 has effectively superseded the "just and equitable" test in the discrimination legislation, in part because of Regulation 15(5) which provides that the "normal time limit" to be extended does not include any extension of time that the tribunal might in its discretion otherwise grant under the "just and equitable" provisions of the discrimination legislation. This was the difficult issue that had to be considered in cases such as *Spillett v Tesco Stores* and *BUPA Care Homes Ltd v Cann [2006] IRLR 248*. This is plainly a point that now needs to be clarified.

20. In our view, therefore, Regulation 15 should be dramatically simplified. In particular, we believe the automatic three month extension which applies where the SGP's apply should be repealed and replaced with a provision which mirrors the rules that apply to SDDP's. Another alternative is to reduce the extension of time to one month, or to enhance the powers of the tribunal to grant a stay of proceedings pending completion of the internal grievance procedure.

How should the SGP's interrelate with the Statutory Disciplinary and Dismissal Procedures?

21. The current interrelation between SGP's and SDDP's is almost impenetrable. This is illustrated in the difficulty the DTI and ACAS have had in providing guidance upon the position. Different rules apply depending whether the SDDP relates to a contemplated dismissal or action short of dismissal. Practitioners are often unclear to what extent regulation 6(5) of the Employment Act 2002 (Dispute Resolution) Regulations 2004 applies (stating that the SGP's do not apply where the grievance is that the employer has dismissed or is contemplating dismissal). The rules need simplification.

Recommendations

22. In our view, where a grievance relates to a freestanding complaint unconnected with the issue being determined by the SDDP, then the SGP should apply. Otherwise, where the grievance is related to the issue being determined in the SDDP, then the SDDP should take priority and the SGP should not apply. The employee should raise the 'grievance' as part of his defence/explanation/mitigation within the SDDP. If he fails to do so then whilst he should not be barred by statute from bringing any subsequent claim – the Tribunal can take the matter into account when deciding whether to award any percentage increase or decrease in compensation.

When should the Modified SGP apply?

23. Currently, the modified procedure only applies where the employee has ceased to be employed and both parties agree that it will apply. There is anecdotal evidence that employees and employers have used this requirement for consent tactically. For example, an employer might insist upon a face-to-face meeting to discourage an employee from bringing a claim. Similarly, an employee might insist upon a face-to-face meeting simply to put the employer to expense.

24. Once the employment relationship has come to an end there seems to be no practical reason why any outstanding dispute should not be resolved by correspondence.

25. The modified procedure might also be extended to apply to circumstances where a large number of employees bring identical grievances, eg. in relation to Equal Pay, where the holding of a large number of individual grievance meetings is impracticable and it is not possible to conduct a ‘collective grievance’ under regulation 9.

26. Thus we believe the modified procedure should apply whenever there is a grievance outstanding following the end of the employment relationship, unless both parties agree otherwise.

ACCEPTANCE OF CLAIM/RESPONSE PROCEDURE

1. We deal here with the following issues:

- Should the Employment Tribunal refuse to accept a claim because the Claimant has failed to provide the compulsory information on the ET1 Form/use the wrong form/fail to follow the statutory grievance procedure.

- Should the ET refuse to accept a Response and/or enter a Default Judgment denying them the opportunity of taking part in proceedings because the Respondent has failed to correctly complete the ET1 Form/use the wrong form/fail to lodge the claim within 28 days of service.

- If Section 32 of the Employment Act 2002 is to be retained should its coverage be extended to workers.

- Can the ET1 Form be modified on the basis it is too complex.

- **Should the ET refuse to accept a claim because the Claimant has failed to provide the compulsory information needed for the claim to be accepted?** 29% of those who answered the ELA questionnaire published as the ELA Employment Tribunal Monitoring Survey 2006 ("the Survey") have had an Employment Tribunal refuse to accept the claim and 55% were dissatisfied with the "Acceptance of Claim Procedure". A further 81% did not believe it appropriate for employees to be denied access to the Employment Tribunal in these circumstances. 79% had been involved in a case in which difficulties had been encountered with the time limit for bringing or defending a

claim and 20% had to seek a review of an Employment Tribunal decision to challenge a refusal to accept a claim.

2. Claims have been refused because the wrong form was used (e.g. laser forms rather than the official form even though they are identical) or because the faxing of the form reduced its size. Fortunately, these matters have been resolved by the Employment Appeal Tribunal on appeal, but such decisions bring the Employment Tribunal into disrepute. Whilst we appreciate the importance of standardising the form in which information is held by the Employment Tribunal system and appreciate their investment in new technology, we consider that the effects of the requirement for the claim to be lodged in a particular form and the refusal of claims that are not on that form is a disproportionate sanction. It also acts as a bar to access to Tribunals for some Claimants and Respondents. We recommend that the old rules on acceptance of claim are reinstated so that a claim will be accepted whatever form is used but that the Claimant will then be required to complete an official form and provide the compulsory information before the claim is forwarded to the Respondents and registered.

3. We have recommended elsewhere that the Statutory Grievance Procedures should be abolished in their entirety and so Section 32 of the Employment Act 2002 should be repealed.

Should the ET refuse to accept a Response and/or enter a Default Judgment denying them the opportunity of taking part in proceedings because the Respondent has failed to correctly complete the ET1 Form/use the wrong form/fail to lodge the claim within 28 days of service?

4. The same principles should apply to a refusal of the Employment Tribunal to accept a response because the wrong form has been used and/or compulsory information has

not been provided. We do not recommend any changes to the 28 day time limit for lodging of the Respondent's Notice of Appearance and/or the power of the Employment Tribunal to enter a Default Judgment if no response is received.

5. However, it is clear from the survey that there was dissatisfaction with the consistency of the application of the procedure on Default Judgments and the setting aside of Default Judgments and we recommend that guidance should be given to Employment Tribunals to improve consistency, possibly by the promulgation of a practice direction on this issue.

If Section 32 of the Employment Act 2002 is to be retained should its coverage be extended to workers?

6. Currently there is an inconsistency of treatment of complaints by employees compared with complaints by workers. This is because of the requirement of Section 32 of the Employment Act 2002 that an employee should lodge a grievance and then wait 28 days before being permitted to lodge Employment Tribunal proceedings. The same principles do not apply to claims by workers. We cannot see any justification for this distinction.

7. In addition, by abolishing the distinction, the problem that occurs when there is doubt about the status of a Claimant as to whether they are an employee or a worker for the purposes of time limits and whether their compensation might be reduced pursuant to Section 31 of the Employment Act 2002 would be removed. If a Claimant believes that they are an employee and follow the grievance procedure, how should the Respondent act if they believed the Claimant is a worker? Should they deal with the grievance or can they simply ignore it without being penalised later with regards to an increase in compensation pursuant to Section 31 of the Employment Act 2002.

8. Likewise, the Claimant who believes that they are an employee and lodges a grievance and waits 28 days before lodging a claim and/or relies on the belief to extend the time limit from 3 to 6 months on the basis of Regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004 could be subsequently penalised if the Employment Tribunal subsequently decide that the Claimant is in fact a worker and so cannot rely upon Regulation 15. In such circumstances, the Claimant would have to rely upon the Employment Tribunals discretion to extend the time limit on the basis that it is just and equitable.

9. We consider that such traps to both the Claimant and Respondent should be eliminated if at all possible and this could be done by extending the requirements of Section 32 of the Employment Act 2002 to workers.

Is the ET1 Form too complex?

10. A knock on effect of the above recommendation would be to simplify the acceptance procedure as it would eliminate the need for certain compulsory information on the Employment Tribunal form. In particular, in Section 3, question 3.1 and 3.2 could be eliminated and replaced by the question asking if someone was an employee and/or a worker of the Respondent. Anecdotal evidence indicates that these current questions are very confusing to Claimants and lead to wrong answers being given and claims not being accepted.

11. If Section 32 of the Employment Act 2002 is repealed as we are recommending, it would obviate the need for many other of these questions in Section 3.

12. However, if Section 32 of the Employment Act 2002 is to be retained, we would ask that consideration be given to further guidance being given to Claimants on the completion of the form to deal with the following:-

(a) Claimants who are applicants for employment who are alleging that they were not appointed due to unlawful discrimination.

(b) Claimants who are alleging that they were unfairly dismissed and that their unfair dismissal was motivated by unlawful discrimination but that they were not otherwise alleging that they were subjected to unlawful discrimination in the course of their employment.

(c) Claimants who are dismissed for gross misconduct and wish to claim unfair dismissal and/or that they should have received their statutory or contractual notice. At the same time we would recommend that the inconsistency of treatment of breach of contract claims between Schedule 3 and Schedule 4 of the Employment Act 2002 should be remedied one way or the other to make it clear whether an employee should follow the grievance procedure before lodging a claim that includes a claim for breach of contract and/or that their compensation will not be reduced by up to 50% because of their failure to follow the grievance procedure.

In either case, guidance should be given to Claimants in the leaflet accompanying the ET1 form advising them how to complete the form with regards to this particular issue.

(d) Guidance should also be given to Claimants who are claiming unfair dismissal and also outstanding holiday pay and/or unpaid wages to obviate the need for

multiple claims, one for unfair dismissal has to be lodged within three months and one for the holiday pay and/or unpaid wages where it appears that a grievance should be lodged before the claim can be proceeded with and then the claim has to wait 28 days and/or exhaust the grievance procedure before the claimant can lodge a claim without being penalised with a potential reduction in any compensation.

(e) Guidance should be given to Claimants who are not employees but are covered by the wider definition of employee contained in most of the discrimination legislation as they worked under a contract personally to execute any work or labour. They are not employees and may not be workers. The same problem applies to Police Constables who have rights to claim unlawful discrimination under the current legislation. They are deemed to be employees of the Chief Constable for the purposes of the legislation but are not employees.

(f) Finally, guidance should be given to Claimants who are alleging that they had been subjected to unlawful discrimination and/or harassment by a fellow employee but are not otherwise complaining about the conduct of their employer. The DTI guidance indicates that they are required to lodge a grievance with their employer before lodging a claim in the Employment Tribunal and that justification for this that the grievance procedure will cover "actions by third parties in cases where the employer could be vicariously liable for their employees' actions". (Paragraph 56 of the Guidance). This guidance does not reflect the correct construction of the discrimination legislation. E.g., Section 32(1) of the Race Relations Act 1976 deems that acts done by a person in the course of there employment are done by the employer as well as by the employee which is constructive liability not

vicarious liability (see Court of Appeal in *Liversidge v. The Chief Constable of Bedfordshire Police [2002] IRLR 651CA*). Why should a Claimant have to lodge a grievance with their employer in circumstances where their only complaint is about the act of a fellow employee for which the employer is deemed responsible but is not otherwise responsible.

FIXED PERIODS FOR CONCILIATION

1. In our view the experiment with fixed periods for conciliation, as prescribed in Rule 22, has been a failure.

2. 81% of respondents to our survey believe the fixed periods were not encouraging conciliation. 67% thought parties were treating these periods not as an opportunity for genuine discussions for the purposes of conciliation, but rather simply as a lull in the proceedings. 96% had experience of ACAS seeking to foster conciliation during the conciliation period, but only 4% thereafter.

   We therefore believe the case against fixed periods for conciliation is overwhelming.

3. The genesis for the idea can be found in the Government's consultation paper "Routes to Resolution" which preceded the Employment Act 2002. At paragraphs 4.8 it stated "*A clearly defined period for conciliation within the process for resolving disputes should help increase the number of timely settlements through conciliation…The fact that many cases settle very close to a hearing suggests that many people do not engage properly in conciliation or do not concentrate fully on their case until it is listed for hearing". Then at paragraph 4.9 it goes on to state "A clear period for conciliation with limited scope for extension might focus the parties' minds within that period on whether they were interested in reaching an amicable settlement or not*".

4. The proposals then found their way into Rule 22. As a result we now have a three-speed system. These are firstly short fixed conciliation periods of 7 weeks, for claims such as unlawful deduction of wages, time off for public duties, time off for antenatal care etc. Then there are standard periods of 13 weeks, for all remaining claims save

for those in the third “open” category which includes discrimination, equal pay and public interest disclosure cases.

5. So far as the “short” periods are concerned, quite apart from anything else they appear to come up against the sheer practical difficulty that it takes time for ET1’s to filter through appropriate channels in large firms and organisations, not to say the inherent difficulties in having ACAS becoming aware, promptly, of the fact that an ET1 has been issued (we return to this later) which means that the 7 week prescribed period can be all but over before there is any possibility of a conciliation process, properly so called, having being started.

6. So far as the “standard” cases are concerned, in the first year of its operation these accounted for more than double the number of “short” period cases, and also amounted to nearly double the number of “open” cases. It is thus these “standard” cases that are most effected by the adverse comment that has been received by most of the profession on the operation of the fixed period system.

7. Of course, the concept of settling cases early, without the need for them to progress through the employment tribunals, thus resulting in the saving of expense, is an attractive one, but is to fail to understand the realities of the litigation process. Once parties have proceeded beyond the “internal” environment (arguably a more significant event with the advent of the new statutory disciplinary and grievance procedures) we do not believe it is realistic to expect an early resolution of the parties’ differences, before they have tested each other’s respective cases. This they do through exchange of pleadings, disclosure of documents, exchange of witness statements, and compliance with whatever other directions may be made by the employment tribunal at case management discussion and pre-trial review stages.

This takes time and these steps are never completed within the frame of the standard conciliation period.

8. That, combined with the well understood expertise ACAS has accumulated through over 30 years of operation in seeking to conciliate employment disputes, means that the process fails to take advantage of their skills in that respect, save for the "open" cases which, arguably because of their more "emotive" impact, may be more intractable than "standard" unfair dismissal disputes in any event.

9. We believe a number of alternatives should now be considered by the DTI to rectify, and improve the prospects of ACAS (and/or, arguably, other third parties) seeking to foster conciliation (or mediation) during the course of a dispute.

(i) On the evidence that is available to us, we would first recommend that the system of having "fixed" periods for conciliation, be abolished altogether.

(ii) If outright abolition would not commend itself to the DTI, we would suggest that the fixed periods either come at the end of the litigation process (rather than at the beginning) or, alternatively, are fixed by reference to other directions as part of the case management process. This would allow the tribunal to consider when most effective use of ACAS' resources could be made. In most cases that would be expected to come after disclosure of documentation and exchange of witness statements, but may not necessarily be so.

(iii) Perhaps more radically, additional incentive could be injected into the process in order to encourage parties to take the fixed periods, and/or

the conciliation process in general, more seriously. Thus, for example, letters containing "minimum positions" could be addressed to ACAS, akin to a Calderbank or "without prejudice save as to costs" procedure in litigation before the common law courts, and if, allied to more rigorous application of costs awards, could be taken into account by tribunals, with reference to the final outcome of the case.

(iv) We recognise there are provisions for mediation in the Tribunals, Courts and Enforcement Bill currently making its way through Parliament. There is a clear relationship between ACAS sponsored conciliation on the one hand, and mediation, whether brokered through a member of the Employment Tribunal Judiciary, or an independent third party on the other. If there are to be practice directions in future in relation to mediation, such as to entitle employment tribunals to make appropriate orders encouraging a reference to mediation (but not on a "compulsory" basis, and not such as to allow for any tribunal member who may become a mediator to hear the case subsequently if it be returned to tribunal, without first having secured the consent of all parties – as the Bill is drafted currently), then appropriate consideration might be given at that time for similar orders to be available to the employment tribunal in relation to conciliation by ACAS.

(v) We understand the budgetary constraints ACAS is having to operate under at present, which is doubtless severely constraining their ability to carry out their duty to conciliate effectively. However, if the 7 week "short" period is to be retained, we do think there should be some sort of corresponding duty for ACAS to make contact with the parties early

within that timeframe. In that respect we anticipate that the 18 “listed” claims to which this applies may carry a greater proportion of unrepresented claimants than in “standard” or “open” cases, and therefore, arguably, they may benefit the most from having an ACAS officer seeking to conciliate between the parties. That having been said we should make clear that as employment lawyers, we can only comment as to our experience in acting for clients, who are represented.

(vi) Finally we should point out that if ACAS conciliation is to be encouraged, and to increase in usage, it is in our view of crucial importance that the reputation of the service is preserved and enhanced, for if it is not, practitioners will not recommend the facility to their Clients, and the rate of take up will decline. Budgetary cuts therefore, could well prove counterproductive if the result (allied to the constraining factor of the current fixed periods for conciliation) is that the reputation of the service declines, and accordingly the number of cases conciliated and settled before reaching the hearing stage before the Tribunal correspondingly declines.

WITHOUT PREJUDICE DISCUSSIONS IN THE LIGHT OF BNP PARIBAS v MEZZOTERO

1. The concept of negotiating on a without prejudice basis has been an invaluable tool for settling civil disputes since at least the 19th century. It is a device that enables the parties to conduct negotiations in the safe knowledge that if settlement cannot be agreed and the case proceeds to a full hearing, the fact that they engaged in negotiations will in no way weaken their case.

2. Marking correspondence 'without prejudice' or conducting discussions on a 'without prejudice' basis makes it clear that any settlement offer is not to be construed as a waiver of rights. What is more, communication marked 'without prejudice' cannot be used in evidence in court proceedings if the attempts at settlement fail and the dispute proceeds to court. The purpose of the rule is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

3. The case of *BNP Paribas v Mezzotero [2004] IRLR 508 (EAT*) has been a major stumbling block to alternative dispute resolution in employment cases. It did not create new law but it clarified the fact that the ability to have 'without prejudice' communications only exists when there is a dispute between the parties; where all that has happened is that an employee has raised a grievance, this is not necessarily classified as a dispute. The logic is that a grievance may be upheld so that the parties never reach the stage where they are in dispute. As such, any communications between the parties whilst a grievance is ongoing may well be 'on the record' even if they are expressed to be 'without prejudice'.

4. In reality the exact scope of the case is ill defined. The interaction of the case with the minimum statutory dismissal/disciplinary/grievance procedures set out in the Employment Act 2002 (EA 2002) raises a number of problems:

5. It is unclear when, if ever, negotiations can be conducted on a 'without prejudice' basis when the minimum dismissal/disciplinary/grievance procedures under EA 2002 are ongoing:

(i) Even though in the BNP Paribas case it was held no dispute had arisen, the case did not address whether some grievances could nevertheless be classified as having the qualities of a dispute (and therefore 'without prejudice negotiations' could be conducted without any risk of them being 'on the record'). It was significant on the facts of the BNP Paribas case that (a) the grievance did not complain about any attempt to terminate the employee's employment and (b) the employer made clear that the grievance would be dealt with separately from the proposed termination (i.e. a 'walk-away' package was not on offer). This suggests that, in other circumstances, a dispute may be held to have arisen even though all that has happened is that the employee has invoked the minimum statutory procedures. For example, it has been held that writing a letter before action constitutes submitting a grievance *[Mark Warner v Aspland [2006] IRLR 87 (EAT)]*. Surely there is a dispute if an employee has written threatening litigation but even if this seems obvious, employers cannot be sure. In practice, employers are tending to play safe and take the view that 'without prejudice' negotiations cannot be held whilst a grievance is on going, regardless of whether a distinction can be drawn between some grievances and others.

(ii) The BNP Paribas case did not address whether a dispute exists if the negotiations take place in anticipation of or in the course of a

dismissal or disciplinary procedure under the EA 2002. If no dispute exists by virtue of certain (if not most) grievances being raised, then why would it be argued that a dispute has arisen by reason of dismissal or disciplinary proceedings having been commenced? Again, employers are tending to play safe rather than negotiate prior to the conclusion of dismissal/disciplinary proceedings.

6. The reason employers are being so cautious is because if an employer is found not to have followed the minimum dismissal/disciplinary/grievance procedures the Employment Tribunal can increase any award of compensation by up to 50%. In light of this, employers will be careful not to risk initiating 'without prejudice' negotiations if this might result in a finding that the minimum procedures have not been followed.

7. Paragraph 2(1) of Schedule 1 of the EA 2002 makes it clear that any meeting to be held to consider dismissal must take place "before action is taken". This could be construed to suggest that if a decision to dismiss is taken before a 'Step 2' meeting is held the dismissal/disciplinary proceedings will not have been followed. This prevents employers initiating or engaging in 'without prejudice' discussions before completing a 'Step 2' meeting if, by doing so, it might suggested that they have already made their mind up to dismiss. Generally employers fear that if they make an offer of a severance package on a 'without prejudice' basis before a 'Step 2' meeting is held and the offer is treated as having been made 'on the record' this is likely to be construed as an indication that they have made their decision to dismiss prematurely. This prevents them from engaging in early negotiations and drives the parties apart as they take their respective, often confrontational, stances in the course of dismissal/disciplinary proceedings.

8. There is no equivalent provision to Paragraph 2(1) relating to grievances but the employer is still likely to feel that if they seek to negotiate with an employee before hearing a grievance and making a decision, the employee will claim the employer did not hear the grievance impartially and whilst the express terms of the EA 2002 may not have been breached, they were clearly breached in spirit.

9. The BNP Paribas case suggests that it might be that communications can be held on a 'without prejudice' basis if the parties agree. However, if an employer makes an approach to the employee to seek his/her agreement to engage in 'without prejudice' negotiations and the employee refuses to agree, the employer risks the employee citing this as evidence that the employer predetermined to dismiss him/her before a 'Step 2' meeting. Most employers regard this as too great a risk to take and therefore they do not even seek the employee's agreement and no negotiations take place.

10. As regards dismissal/disciplinary/grievance procedures, must the employer wait until an appeal has been held and a decision reached before negotiations on a 'without prejudice' basis can safely begin? Or is it enough that the negotiations be conducted by someone other than the person hearing the appeal so that the negotiations cannot taint the independence of the appeal decision? There is no suggestion in BNP Paribas that negotiations have to await the outcome of the appeal but we are even seeing employers waiting until after the appeal before engaging in negotiations.

11. The effect of the above uncertainties is that on a regular basis the minimum statutory grievance and disciplinary procedures are serving to inflame rather than resolve employment disputes. The employee will not want to approach the employer to see if matters can be resolved for fear the employer will refuse to engage in negotiations thereby leaving the employee feeling weakened by having asked if the employer will negotiate and having been rebuffed. The employer cannot be seen to let down their

guard for fear the employee will claim the minimum statutory procedures have not been followed.

12. What solutions can there be to this conundrum? There is no unanimity of view amongst the members of the consultation group about the recommendations made below. The inequality of bargaining power between employer and employee at this crucial stage of the relationship means that any attempt to formalise 'without prejudice' discussions must ensure that the employee feels under no additional pressure either by entering into discussions or by rejecting what is on the table. Any attempt to formalise 'without prejudice' discussions must result in a scheme which caters for employees in all sectors with varying levels of experience and understanding of employment law and their rights thereunder. Many of them will be without access to good legal advice. Such a scheme should not place additional burdens on small employers who may be unable to separate negotiation from disciplinary action, however such employers should not be allowed flagrantly to undermine the rights of their employees at such a vulnerable moment.

13. The suggestions below would require government intervention or legislation in order that clarity can be achieved[1].

(a) The concern expressed in *BNP Paribas v Mezzotero* was that given the employee's vulnerable position and the unequal relationship between the parties it is not even possible to rely on the parties expressly agreeing that any communications be held on a without prejudice basis. In light of these concerns the suggestions below are proposed on the basis that there be a set

[1] NB: The suggestions are made on the basis the dismissal, disciplinary and grievance procedures in EA 2002 will continue in force in their current form. These suggestions will require modification if these are to be modified or abolished.

formula for employers to follow when they initiate 'without prejudice' negotiations (statutory negotiation process) involving:

(b) One proposal is that **statutory guidance** be issued outlining the circumstances in which it would be reasonable for an employer to initiate a 'without prejudice' discussion. In order to ensure there are sufficient safeguards in place to protect both parties the guidance should:

(i) explain the nature, purpose and scope of 'without prejudice' discussions;

(ii) be readily available to employees in the same manner as the staff handbook, for instance;

(iii) provide that the employee should have a right to be accompanied to any 'without prejudice' meeting by a colleague or trade union member;

(iv) advise that the employee seek independent legal advice;

(v) make it absolutely clear to the employee that s/he can withdraw from such negotiations at any time without repercussions;

(c) another proposal is that there should be **a statutory form** that an employer can give to an employee inviting him/her to negotiate. This would be a form along the lines of that currently used to request flexible working. This can be presented to an employee at any time after dismissal/disciplinary/grievance proceedings have been commenced (i.e. the employer notifying the employee in writing that he/she is contemplating dismissal / relevant disciplinary action

or the employee notifying the employer in writing of his/her grievance). We have considered permitting it at an earlier stage but we consider the employer and employee should be aware of any allegations against them before entering into negotiations;

(d) The statutory form could state:

(i) the purpose of the 'without prejudice' communications is to attempt to avoid legal proceedings arising from a dispute about the matters raised in the dismissal / disciplinary/grievance proceedings;

(ii) (if the request is made before the statutory procedure has been completed) it should not be taken as pre-judging the employer's or employee's position on the grievance or contemplated dismissal / disciplinary action; and

(iii) the effect of the communications being 'without prejudice' is that:

(1) they do not form part of the statutory dismissal / disciplinary procedure; and

(2) they may not be referred to in legal proceedings arising from a dispute about the content of the grievance or the contemplated dismissal / disciplinary action, save that the fact that without prejudice communications are occurring may be referred to by way of explanation for delay in completing the statutory dismissal / disciplinary procedure;

(3) in order to accept the offer to negotiate the employee must consult an independent legal advisor (as the term is defined in s203 Employment Rights Act 1996)

(e) A statutory form signed by both parties and the independent solicitor agreeing to enter into 'without prejudice' discussions would then be required following which negotiations can take place.

(i) Ideally the person or persons conducting the dismissal/disciplinary/grievance procedures on behalf of the employer should not be involved in the 'without prejudice' negotiations but a small employers' exemption may be considered in this regard.

(ii) Merely requesting a without prejudice meeting on a statutory form and subsequently conducting negotiations should not raise any presumption that the employee is being victimised or otherwise discriminated against. That said, as a matter of public policy any harassment, undue pressure or discriminatory comments made in the course of 'without prejudice' negotiations should be admissible[2].

(iii) This suggested statutory negotiation process provides a safe environment in which negotiations can be conducted. As settlement agreements are only binding in an employment context if the employee engages an independent legal advisor, the suggestion that he/she do so in order that negotiations be initiated does not seem overly burdensome on the employee.

[2] **Brunel University -v- Vaseghi EAT0307/06 (EAT)** reiterates the point that the without prejudice rule cannot be used as a 'cloak for unambiguous impropriety'; it is in the interests of public policy that discriminatory comments made in the course of without prejudice discussions are admissible in evidence.

(iv) The above deals with negotiations initiated by the employer. If, on the other hand, an employee approaches the employer to initiate a 'without prejudice' discussion to discuss the termination of his/her employment, the employee should be guaranteed that such an approach will always be privileged and treated as 'without prejudice'. This should not need a statutory form to be completed as this would be too onerous but the employee has the option of requiring one to be signed. The employer should be able to engage in such a discussion without fear that it would be regarded as an 'on the record' communication. This should be the case whether or not dismissal/disciplinary/grievance proceedings have been commenced. It is submitted it should not be necessary for them to even be contemplated. It would be important to record that the approach was made by the employee rather than the employer to provide some protection for an employer where an employee might later choose to suggest otherwise.

(f) The suggestion at (v) above would enable employees to initiate discussions regarding their departure for a variety of reasons. A non-exhaustive list would be:

(i) They may feel they have grounds to claim constructive dismissal;

(ii) They may have had an 'at risk' letter advising them they are at risk of being selected for redundancy and they might be amenable to discussing severance terms;

(iii) They may anticipate or be in the midst of a performance management process and prefer to have an alternative whereby they can leave in a dignified and mutually agreed manner;

(iv) It would need to be clear that in making a ‘without prejudice’ approach the employee is not to be taken as admitting to shortcomings nor to the fact that there are grounds to dismiss him or her.

There should be some stay, of a few days or a week, in disciplinary or grievance proceedings if without prejudice negotiations are being conducted.