

6

Unfair dismissal

Introduction

Unfair dismissal is a huge topic. One of the standard textbooks, I.T. Smith and G. Thomas, *Smith and Wood's Industrial Law* 8th edn (Oxford University Press, 2003) spends 129 pages on this topic and there are books devoted to it. The student is likely to become overwhelmed by the detail: not just are there some 40,000 claims each year for unfair dismissal that are unreported, but all those that reach the Employment Appeal Tribunal (EAT) are to be found on its web site. The facts of these cases are often memorable but what the student needs is a firm grasp of the structure of the claim coupled with a knowledge of the basic cases, in particular *Iceland Frozen Foods v Jones* [1983] ICR 17 and *British Home Stores v Burchell* [1980] ICR 303n. The relevant part of the Employment Act 2002 came into force in autumn 2004, but is scheduled to be abolished during the currency of this book: at the time of writing, it is unknown what, if anything, is to replace it.

Leaving aside automatically fair and automatically unfair dismissals, the authors recommend the following approach:

1. Was the employee qualified to bring a claim for unfair dismissal? The employee must prove that he or she is qualified.
2. If so, was the employee dismissed? The employee must prove that he or she has been dismissed.
3. If so, what was the reason for the dismissal? The reasons are: capability, conduct, redundancy, breach of statute, and 'some other substantial reason'. The employers must prove that they held one of these five reasons.
4. If the employers prove one of the five so-called potentially fair reasons, was the dismissal reasonable? The amendments to the law brought about by the Employment Act 2002 (in force October 2004) are particularly important. If they do not so prove, the dismissal *was* unfair, and the tribunal goes immediately to stage 5.
5. Which remedy is the tribunal to award? The tribunal must look at the remedies in this order: reinstatement (same job back), re-engagement (different job), and

compensation. There is slightly complex law about the award of compensation but the clever student will have a paragraph or two which he or she can write out to answer a question which calls for a discussion of the remedy for unfair dismissal. As the authors have stressed several times in this book, students often miss out remedies but a discussion can hardly ever be inappropriate and the rewards in terms of marks and favourable impression on the examiners will repay the effort!

With that strong framework for analysis in mind, let's see how it can be used in practice.

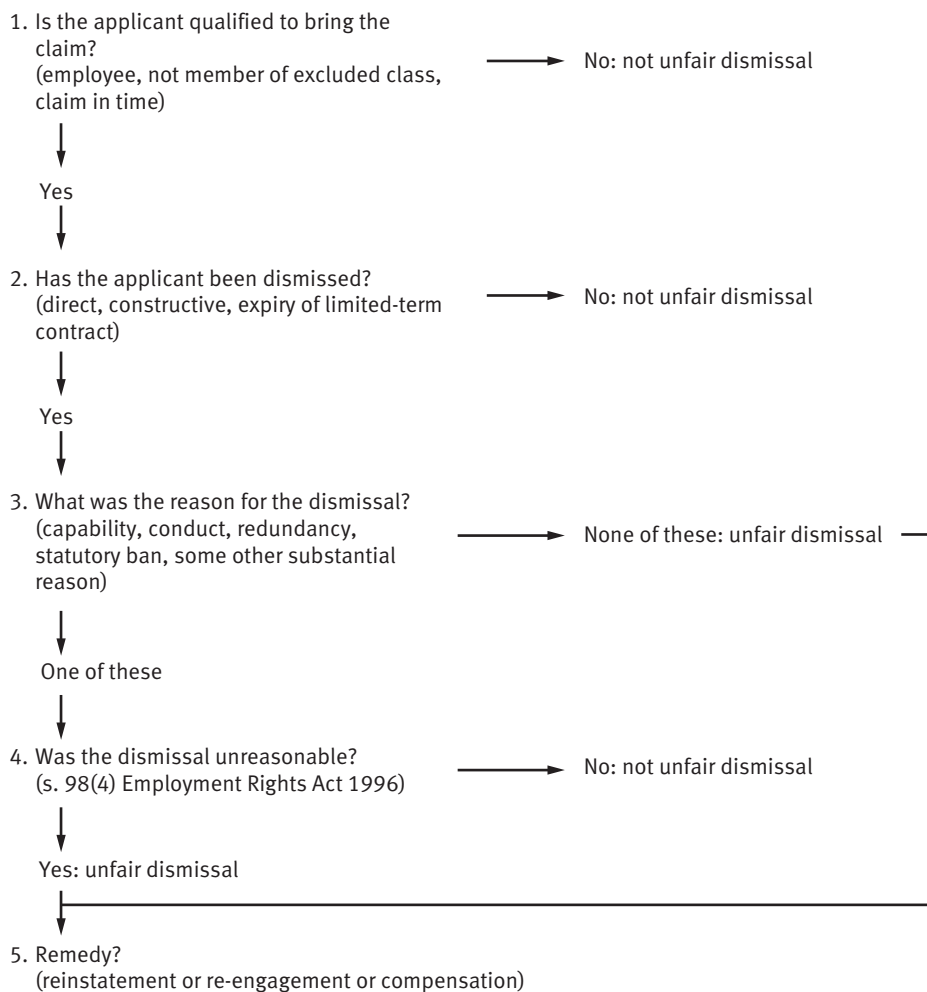


Figure 6.1: An outline of the five stages of an unfair dismissal case where the applicant has not been automatically unfairly dismissed

Note: The burden of proof is on the employee at stages 1 and 2; is on the employers at stage 3; is neutral at stage 4; and lies on the party who asserts at stage 5 (normally the employee but if the employers assert lack of mitigation, the onus is on them).

Question 1

Alice has worked as the company accountant for a small firm called Jam Ltd for several years. The company's managing director is James A. Milne. One day James sees Alice open the company safe and remove a large sum of money, later found to be £5,000, and put it into her handbag. On his asking her what she was doing, she replied: 'I can't tell you!' He sacked her on the spot. In fact she was giving the money to her ex-husband, Brian, to secure the return of their son, Charles, whom Brian had abducted the previous day.

Would Alice be successful in an action for unfair dismissal?



Commentary

The rubric is restricted to unfair dismissal; therefore, it would be incorrect to discuss wrongful dismissal or any other claim. It is also important to remember that the examiner is looking for legal argument; it does not matter whether the candidate thought that there was an unfair dismissal or not but whether the legal arguments in the answer are acceptable.

The question invites a discussion of unfair dismissal and the subject has to be covered within a set time. Therefore, before entering the exam room, the candidate should know how to tackle a straightforward unfair dismissal question. (By 'straightforward' is meant a claim where the alleged unfair dismissal is neither 'automatically' unfair nor 'automatically' fair.) The answer demonstrates a possible sequence for answering such a question.



Answer plan

- Qualifications for unfair dismissal
- Dismissal
- Reason to dismiss: conduct
- Reasonable dismissal: size and administrative resources of the employers and equity and the substantial merits of the case; 'band of reasonable responses' test, fair procedure; statutory dispute resolution procedures
- Remedy: reinstatement; re-engagement; compensation: basic and compensatory award—quantum and deductions

Suggested answer

Alice must prove that she is qualified to bring an unfair dismissal (UD) claim. It seems that she is an employee of the firm. She is a 'company accountant', a phrase suggestive of permanent employment with Jam; the question also states that she works 'for' the

company. Since she has done so for several years, she meets the one year's continuous employment qualifying period for UD. She is not subject to the rules on retirement, in force 1 October 2006, has brought the claim within three months of the effective date of termination (or if that was not reasonably practicable within a reasonable time), and is not a member of an excluded class such as a share fisherperson. Therefore, she is qualified to bring a UD claim: see s. 94 of the Employment Rights Act 1996 (ERA).

The question states that she has been dismissed and that the dismissal has instant effect. She is therefore dismissed within s. 95(1)(a) ERA. The onus of proof of dismissal lies on the applicant.

The reason for dismissal is theft. This constitutes gross misconduct: *Sinclair v Neighbour* [1967] 2 QB 279. There may a clause in her contract to similar effect and the ACAS Handbook *Discipline at Work* also so provides in stating that there can be a dismissal without notice for gross misconduct when there is theft from the employers. The burden of proof at this stage lies on the employers and they will have no difficulty.

The next stage is that of the reasonableness or unreasonableness of the dismissal. Since 1980 the onus at this point has been 'neutral'; in other words, no party bears the burden but the tribunal must make up its mind, and fairness is a matter of fact, not of law.

On the facts of the present case the issue of unfairness is the principal difficulty. ERA, s. 98(4) states inter alia that the question whether the dismissal was fair must be determined in accordance with equity and the substantial merits of the case, and regard must be had to the size and the administrative resources of the employers. Several issues arise for comment. Though in the general run of cases the employee should be informed of the allegation against her, there is no need to do so if she is caught redhanded. However, the ACAS Code of Practice *Disciplinary and Grievance Procedures* 2004 recommends among other things the right to reply and the right to appeal. She has not been given the right to reply or to appeal, though it is not expected that in a small firm, as this company is, there will be an elaborate appeals structure: size matters, as s. 98(4), ERA provides. Breach of a Code of Practice is not necessarily fatal to the employers' defence but can be taken into account by the tribunal when assessing reasonableness. Besides the Code tribunals usually follow the guidelines laid down in *British Home Stores Ltd v Burchell* [1980] ICR 303n, EAT, which was itself a case of theft. Although the case is only of EAT authority, it has been approved by the Court of Appeal on several occasions including *W Weddel & Co Ltd v Tepper* [1980] ICR 286. *Burchell* provides a threefold test:

1. Did the employers believe the reason they gave for dismissal? Here, they did believe that they were dismissing for theft.
2. Did they have 'in mind reasonable grounds upon which to sustain that belief?' Here they did have such grounds because Alice was seen to remove the money.
3. Did they carry out 'as much investigation into the matter as was reasonable in

all of the circumstances of the case?' On the facts an investigation should have revealed the true situation. It may be that the dismissal was unfair for this reason.

The third question is a pointer to the importance of procedural fairness after *Polkey v AE Dayton Services Ltd* [1988] AC 344, HL. An otherwise fair dismissal can be rendered unfair when the procedure was unfair unless going through that procedure would be utterly useless or futile. On the facts no investigation was undertaken and no account has been taken of Alice's employment record, which may be exemplary. It should, however, be noted that the Employment Act 2002 to some degree resurrects the rule in *British Labour Pump Ltd v Byrne* [1979] ICR 347 that a dismissal which was procedurally unfair will be a fair dismissal if going through a fair procedure would have made no difference to the decision to dismiss. Section 29 of the 2002 Act deals with dismissal for gross misconduct, as occurred here. The employers must give the employee a statement as to why they are dismissing for gross misconduct, detailing the grounds they had at the time of dismissal for thinking that the employee was guilty of gross misconduct. The written document must also contain a statement about the employee's right to appeal. If there is an appeal, the employers must notify the employee of the outcome of the appeal. If s. 29 is not complied with, the dismissal is automatically unfair (new s. 98A of the ERA, inserted by the Employment Act 2002) and the tribunal must make an award of four weeks' pay; if the employers fail unreasonably to follow the statutory procedure, the tribunal may increase the award of compensation by between 10 and 50 per cent. (For further details of the 2004 changes see Question 2.)

Beyond procedural fairness the tribunal must not substitute its own decision for that of the employers: see *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT. Although *Iceland's* 'range of reasonable responses' test came in for criticism just around the turn of the millennium, it was strongly reaffirmed by the Court of Appeal in *HSBC v Madden* [2000] ICR 1283. Therefore, if the current employers did dismiss and a reasonable employer on the same facts may have dismissed, the dismissal is fair.

Leaving aside the issue of the statutory fair dismissal procedure, if the employee has been found to be unfairly dismissed, she is entitled to a remedy. The tribunal must explain the potential remedies: reinstatement (same job), re-engagement (similar job), and compensation, which comprises a basic and a compensatory award. The tribunal must look at the remedies in the order stated. Reinstatement within s. 114(1), ERA is possible on the facts. Trust and confidence may remain and the employee may well wish to be reinstated and it does not seem impracticable to reinstate. The tribunal has to take into account any contributory fault by Alice. If reinstatement is not ordered, the tribunal is to consider re-engagement next. It may be that there is not a job similar to that of company accountant in such a small firm. If neither remedy is awarded, the tribunal deals with compensation. The basic award is calculated on the same basis as a redundancy payment (except that years of work under 18 count), subject to a maximum week's pay at the time of writing in late 2007 of £310. There is a formula for working

out the total based on age, length of continuous employment (20 years maximum), and the week's pay. The current maximum is £9,300. Misconduct may lead to a reduction in the sum. In addition the compensatory award is calculated under the heads laid down in *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45, NIRC, subject to a maximum of £60,600. This sum is also subject to deductions, in particular in respect of failure to mitigate and contributory conduct.

Summary

While the issue of fairness is one for the tribunal, Alice may well win her claim; if so, she is entitled to a remedy as outlined in the previous paragraph.

Question 2

Outline the changes brought about by the Employment Act 2002 (Dispute Resolution) Regulations 2004.

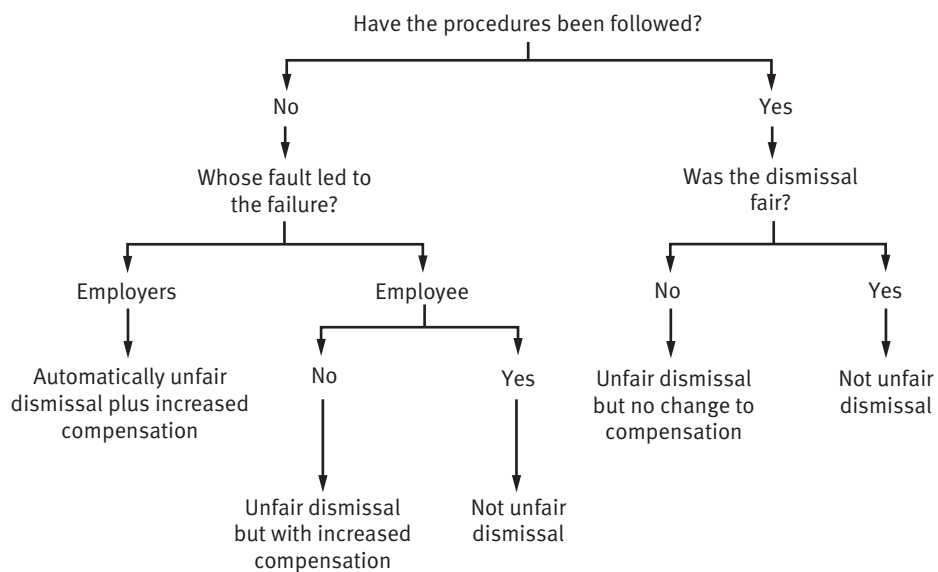


Figure 6.2: The 2004 procedures

Source: Adapted from p. 28 of the DTI's *Guidance on the Employment Act 2002 (Dispute Resolution) Regulations 2004 and the associated provisions in the Employment Act 2002, 2004*



Commentary

Examiners are always keen for candidates to demonstrate that they have a good grasp of recent changes, especially ones which affect one of the core areas of employment law, unfair dismissal, in such a fundamental way. This is also the type of question and answer that can be 'raided', to be used in other unfair dismissal answers including answers to problems.

The answer below seeks to deal with the question set and to place the changes in the context of the previous law. The amended law could be restated in the answer in several possible ways, and the answer below exemplifies only one possible approach. The examination candidate who cannot tackle this question swiftly and acceptably should move on when reading the exam paper but if he or she has a firm understanding of the topic, this is very much a question on which high marks can be scored. Note that, while the 2004 Regulations are scheduled to be repealed during the currency of this book, it is unknown at the time of writing what, if anything, will replace them.



Answer plan

- The Employment Act 2002 as implemented by the 2004 Regulations
- The aim of the Regulations
- The effect on unfair dismissal
- Statutory discipline and dismissal procedure (SDDP); statutory grievance procedure (SGP)
- Meetings and appeals
- Difficulties and exceptions
- Effect on procedural fairness and quantum
- *Polkey*
- Critique

Suggested answer

The law, which affects claims brought to employment tribunals after 1 October 2004 including ones founded on continuing policies, is based on the 2002 Employment Act. The rules are found in s. 32 and Schs 2 and 4 to the Act. There are other practitioner-oriented changes such as amendment to the application form (now renamed the ET 1), but these will not be discussed here. Not every aspect of that statute has been brought into force by the 2004 Regulations (mention should be made of the fact that currently the government does not propose to bring into force the provision that the procedures mentioned below are to form part of the contract of service with consequential effects on remedies) but the aim of the government was very clear: it wanted to reduce the number of applications going each year to the tribunals, over 100,000 in most recent years, and more if one realizes that an application may contain more than one claim, by

some 30 per cent. This reduction would save money but it would also be in tune with the desire of the government to divert what would previously have been tribunal cases into other routes for the resolution of disputes; in particular, it wished to resolve claims at the earliest possible opportunity: in this way it was hoped that more employees than before would be reinstated after a grievance.

It might have been expected that with such laudable aims the government would have produced a simple and effective way of diverting applications but as we shall see, the law is complex. It should also be noted that though this answer is one on unfair dismissal, the procedures are much broader than that area of law; employment law claims under the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Sexual Orientation) Regulations 2003 (SI 1661), and the Employment Equality (Religion or Belief) Regulations 2003 (SI 1660), fall within the 2004 Regulations, as do some other rights e.g. detriment in respect of trade union membership and activities within s. 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 and detriment in respect of the statutory union recognition process in Sch. A1 to that statute, unauthorized deductions from pay, detriment in employment and redundancy payments under the Employment Rights Act 1996, detriment under the National Minimum Wage Act 1998, breach of contracts of employment when heard in employment tribunals under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and detriment under the Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323). Other aspects of employment law are not covered: a non-exhaustive list includes refusal of employment on the ground that the applicant is or is not a member of a union (TULR(C)A 1992), failure to provide a written statement, failure to provide paid time off for ante-natal care/dependants, parental leave, right to request flexible working, failure to provide written reasons for dismissal (all under the ERA 1996), the right to be accompanied (the Employment Relations Act 1999), and the right not to be less favourably treated or suffer detriment found in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 1551) and in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2034).

The basic approach

The Act introduces two new dispute resolution procedures, the dismissal and disciplinary procedure (DDP) and the statutory grievance procedure (SGP). The procedures apply to claims listed in Sch. 4 to the 2002 Act (see above). It should also be stressed that the changes apply only to employees and not to all workers. Therefore, there is the jurisdictional issue of finding out whether a worker is an employee or not. Workers may well be protected by discrimination law (see Chapter 1 of this book), but they will not fall within the ambit of the Act and Regulations unless they are employees.

The dismissal and disciplinary procedure

The standard DDP applies when the employers are considering dismissal (for any reason including redundancy and including the expiry of a limited-term contract) or if they are contemplating disciplinary action including suspension on no or reduced pay on the ground of conduct or capability (only). The DDP does not apply if the retirement is by mutual agreement or if the retirement is in accordance with the Employment Equality (Age) Regulations 2006 (SI 2006/1031). If the standard DDP applies, the employers must provide the employee with a written statement of the basis for the discipline or dismissal together with an invitation to a meeting (step 1); step 2 is the meeting, after which the employers inform the employee of the decision and of the right to appeal; step 3 is the appeal, after which the employers tell the employee of their decision. There is also a modified DDP: this occurs when the employers have lawfully dismissed the employee without notice for gross misconduct on discovering that misconduct or shortly afterwards, in circumstances in which it was reasonable to do so without investigating those circumstances. 'Lawfully' here means: 'the employers were legally entitled to dismiss without notice'. In that event the employers must provide the statement of the reason for the dismissal and provide an appeal but there is no meeting to discuss the dismissal. If either the standard or as the case may be the modified DDP is not followed by the employers, the dismissal is automatically unfair. It should be stressed that even though the employers have followed the correct DDP, the dismissal may still be unfair, for example because they did not have a potentially valid reason to dismiss or they did not act in a procedurally fair way (see also below). If an employee is dismissed but the decision to do so is reversed on appeal, continuity is preserved.

The statutory grievance procedure

A grievance is defined as 'a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him'. This definition includes complaints by one employee against another (see below). There are problems with this definition. These three are taken from the EOC's website for legal advisers. First, does 'action' cover 'omission'? In another area of employment law the House of Lords held that it did not and 'action short of dismissal' was changed by Parliament to 'detriment' to get round this problem; perhaps that interpretation will be used here. If so, part of the thrust of the SGP will be stultified. Secondly, do actions taken 'by an employer' cover action done by colleagues? Take, for example, harassment by a coworker. The employer may be vicariously liable but can such harassment be 'action which the employer has taken'? The DTI's (now the DBERR's) Guidance 2004, para. 56, assumes that vicarious liability is covered. Thirdly, can the action be said to be taken 'in relation to him' when the employer has a discriminatory policy? A ban on part-time work may be discriminatory against one gender unless justified but it is difficult to say that such a prohibition is action taken against this particular employee.

The *standard* procedure consists of three steps:

1. The employee sends a written copy of the grievance to the employers. There is no template for what the employee is to write but it is suggested that the complaint letter (or email or other form of communication in writing) should be fairly full in order that the employers are apprised of the substance of the complaint.
2. The employers invite the employee to a meeting to discuss the grievance. There is a duty on the employee to take all reasonable steps to attend the meeting. The nature of the meeting is considered below. After the meeting the employers must tell the employee of the decision and the right to appeal, should the employee not be satisfied with the decision.
3. If the employee does not wish to appeal, the employers must be told; if the employee does wish to appeal, the employers must invite him or her to an appeal meeting. The employee must take all reasonable steps to attend the meeting. After the meeting the employers must inform him or her of the outcome.

Discrimination questionnaires are not part of step 1 in the SGP.

The *modified* grievance procedure applies when the employee has ceased employment *and* the employers were not aware of the grievance before the end of employment (or if aware, the SGP had not been initiated before termination) *and* both parties agree in writing to the modified procedure. Facts which fall within all three conditions will probably be rare.

The differences from the SGP are that there is no meeting to discuss the grievance and that there is no appeal. The steps in the procedure are:

1. The employee sends to his or her former employers a statement of the grievance.
2. The employers send their reply to the former employee.

The meeting and the appeal meeting

The Regulations do not provide a timetable for these meetings. Obviously the first meeting cannot take place until the employers have received the grievance and they must have a reasonable opportunity to consider any response. Schedule 2 to the Employment Act 2002 provides that any step taken under the SGP (or the DDP) must be taken without reasonable delay. The same Schedule stipulates that the time and locations of all meetings must be reasonable, that the meetings must be conducted in such a manner that both sides are able to explain their cases and that on appeal the employers' representative should if possible be of a more senior level than the person who was at the initial meeting. If the employee, his or her companion (see below) or the employers could not attend the meeting for a reason unforeseen at the time of arranging the meeting, the employers must invite the employee (and if there is one, the companion) to a meeting. If it happens that for the employee it was not reasonably practicable for unforeseen reasons to attend this meeting, the law deems the parties to have completed the SGP. The effect is that neither party suffers an increase

or reduction in compensation received or to be paid. If either party did not attend a rearranged meeting for a reasonably foreseen reason, there is no further duty to attend another meeting and the tribunal may attribute fault, with a consequent effect on the compensation. The procedure is deemed to have been complied with and the effect is that the normal three months' time limit applies (i.e. there is no extension).

If the employee is disabled, the employers must make reasonable adjustments for him or her under the Disability Discrimination Act 1995 as amended.

The right to be accompanied

By s. 10 of the Employment Relations Act 1999 a worker (not just an employee) has the right to be accompanied at a grievance hearing (as well as at a disciplinary or dismissal hearing). The worker may be accompanied by a colleague or by a union official but not, for example, by a lawyer. If the employers refuse to allow the worker to be accompanied, the worker may apply to an employment tribunal. The sanction is an award of up to two weeks' pay, subject to the normal statutory maximum (£310 p.w. from 1 February 2007). If the companion cannot make the meeting, the 1999 Act provides that the employee must propose an alternative date within five days.

Difficulties with the law

There are some problems. First, a constructive dismissal falls within the SGP and not as might have been expected by all employment lawyers within the 'dismissal' part of the DDP. It is for this reason that the statutory grievance procedure has been noted in an answer to a question on unfair dismissal. Secondly, 'disciplinary' within DDP does not include warnings, whether oral or written. Thirdly, there is a possibility of overlaps. For example, if an employee has disciplinary action taken against her which is discriminatory, does she have an SGP on the basis of discrimination or should there be a DDP because there has been a 'disciplinary'? The standard DDP applies to disciplinary action taken on the grounds of conduct or capability but the SGP applies if the action was discriminatory just as it does if the action is taken for any other reason than conduct or capability. Another difficulty is this: if the employee makes a protected disclosure within the Public Interest Disclosure Act 1998 (as inserted in the Employment Rights Act 1996), he or she has a choice of going down the SGP route or the whistleblowers' route: but once the employee has chosen the route, there is no going back.

Exceptions

There are also exceptions to the law. It should be noted that if these exceptions apply, the normal time limits also apply, as indeed does the whole law of unfair dismissal. The principal exceptions to the DDP are:

- oral warnings;
- written warnings;
- suspension on full pay;

- constructive dismissals (as mentioned above: the SGP applies);
- collective redundancies (20 or more employees within 90 days);
- dismissal and immediate re-engagement of a class of employees (e.g. where the employers desire to change the contract of employment);
- most dismissals occurring as a result of industrial action, the exception being where the employers make selective dismissals of those taking part in lawfully organized ('official') action or where the employers have not taken reasonable steps to resolve the industrial action (cf. TULR(C)A ss 237, 238 and 238A, the last as inserted by the Employment Relations Act 1999 and since amended);
- dismissal where the continued employment of the employee would be illegal, but the normal unfair dismissal rules do apply;
- dismissal consequent on a sudden and unforeseen event, but it should be remembered that the normal unfair dismissal rules continue to apply;
- dismissal where the employee or employers have reasonable grounds for the belief that the employee or another may be injured or the employee's or another's property damaged;
- the employee or employers have been harassed and starting or continuing the process would lead to further harassment;
- it is not practicable to commence the DDP, e.g. because of the employee's illness.

The modified DDP applies where the employee has filed an application to the tribunal before the employers have sent him the step 1 letter, a statement of the reason for the discipline or dismissal. In this event there is no adjustment to the compensatory award as detailed below.

The DDP is deemed to have been completed when:

- the employee applies for interim relief within seven days in a case of victimization on trade union grounds;
- the employee appeals to an outside body under an 'appropriate procedure' agreed between an independent union and the management (in this case steps 1 and 2 of the DDP must have been completed).

Since the DDP is deemed to have been completed, the time limit which normally applies in unfair dismissal claims, three months, is extended by a further three months.

The SGP exceptions are mainly the following. In all of them the Regulations deem the SGP to have been completed. First, if the employee has been harassed and has reasonable grounds for believing that starting the SGP or continuing with it would result in more harassment, he or she is deemed to have completed the SGP. However, the process is deemed to have not been completed and the fault for the failure is laid at the employers' door with the effect that if the claim is successful, the amount of compensation will be increased. Secondly, if the employee has reasonable grounds for believing that if he

or she started the SGP, the employers would make significant threats to him or her or his or her property or to a third party or his or her property, the SGP need not be used. Thirdly, if the employee has left employment and it is not reasonably practicable to go through the SGP, the procedure does not apply. Fourthly, if the grievance is a collective one, that is, one involving two or more employees and raised by a trade union official (or if there is no recognized union, by the staff representative), the SGP does not apply to those named in the written grievance document. Fifthly, it is not practicable to start the process, as when the employee is seriously ill or the employers' factory is burned down. It should be remembered that a grievance about a dismissal falls within the DDP unless the dismissal was constructive. Where the SGP is deemed to have been completed, the normal three months' time limit for unfair dismissal cases is extended by three months.

Effect of the changes to the law

If the rules apply, a claimant who issues an ET1 will not have his or her claim heard if he or she fails to start the SGP. If the claimant starts the SGP but does not complete it before proceedings commence, the ET will reduce compensation by between 10 and 50 per cent. It must make the 10 per cent reduction and may make a reduction of up to 50 per cent unless it would not be just and equitable to make such a reduction. These uplifts and reductions affect only the compensatory award of unfair dismissal, not the basic award. However, if the employers failed to complete the DDP, the basic award is subject to a minimum award of four weeks' pay. The compensatory award remains subject to the statutory limit even though there has been, say, a 50 per cent increase in the amount which would otherwise have been awarded. The same rules about compensation also apply where the failure to complete the procedure was due wholly or mainly to the employee's failure to comply with the conditions of the SGP or to appeal under the SGP. There is a real difficulty for applicants here. If they bring their claims before the completion of the SGP, their compensation will be reduced. However, if they wait too long, the limitation period may well have elapsed. The normal discretionary extensions to the employment tribunals' power to hear claims after the period has elapsed ('not reasonably practicable' or 'just and equitable' depending on the jurisdiction) continue to apply, so it may be that the tribunals will exercise the discretion to extend the periods in such circumstances.

If the employee brings a claim to which the DDP applies and has completed step 1, the time limit of three months in the case of a claim of unfair dismissal is extended by three months. If the DDP is completed, however, within the normal three month limitation period for unfair dismissal claims, that time limit still applies and is not extended (e.g. to three months after completion). If the DDP applies, but the employee does not complete step 1, the claim is inadmissible.

What about *Polkey*?

If the employers do not complete the DDP, the dismissal is automatically unfair. If, however, they do so comply, but they do not comply with an additional procedure which it would have been reasonable to follow, such as the ACAS Code of Practice on Disciplinary and Grievance Procedures as revised from time to time or the staff handbook, then the dismissal will nevertheless be fair if the employers demonstrate that following such additional procedure would have made no difference to the dismissal *and* that the dismissal is substantively fair. If the DDP is not applicable, the employers can nevertheless seek to convince the tribunal that following any additional procedure would have made no difference. See s. 34 of the 2002 Act, which inserts s. 98A into the 1996 Act.

The written statement

The 1996 Employment Rights Act is amended so that employers have to provide employees with a written statement including their disciplinary rules and the new minimum dispute resolution procedures, no matter how many employees are employed. If the tribunal finds the statement to be inaccurate or incomplete, it must award compensation, and may award two to four weeks' pay (capped in the usual fashion: for the year from 1 February 2007, the limit is £310) where compensation is the remedy awarded, as it normally is in an unfair dismissal claim. If compensation is not a possible remedy, then the tribunal may make a separate award of the same discretionary amount. No award in either case will be made if to do so would in the tribunal's view be unjust or inequitable. See s. 38 of the Employment Act 2002 for details.

Question 3

Erica has worked for some years as a postroom operative for Freddie's Ltd. She has come under increasing pressure at home because her husband has left her. She has to look after her young son and her aged mother. Her line manager, George, has noticed that she has been getting slower at her job and, after warning her on several occasions, he dismisses her when she spills coffee over an important document.

Consider Freddie's liability for unfair dismissal, if any.

**Commentary**

Read the rubric! The question is not about sex discrimination or wrongful dismissal. Any discussion of irrelevant matters will not score marks, will waste time, and will create a bad impression. The question is solely about unfair dismissal.

76 | Unfair Dismissal

The answer to many unfair dismissal questions is straightforward but the amount of possible material to include can appear daunting. It is suggested that if the candidate writes something about the five issues normally involved in a problem dealing with non-automatic unfair dismissal, he or she is on the way towards passing and if the topics are considered in a logical manner, he or she is heading for a decent mark. Once the structure is arranged, then comes the hard bit of selecting material to use in the time. One framework is what the authors call 'QDR3': qualifications, dismissal, reason, reasonableness, remedy. Such a structure allows the candidate to fit the material under the various headings and ensures that he or she does not miss a major topic out. (See the flowchart in Figure 6.1.) The authors suggest that subheadings are used: it appears to the examiner that the writer can organize material.

No examiner on undergraduate courses expects calculations of compensation for unfair dismissal, but a good student ought to be able to give an outline of the ways in which the basic and compensatory awards are calculated and the deductions from each award. Writing about these issues is easy and can provide 'easy' marks, especially as not all students do write about the remedy.



Answer plan

- Qualifications
- Dismissal
- Reason: capability
- Written reasons claim
- Fairness of dismissal: *Iceland Frozen Foods* and *Burchell*; s. 98A of the Employment Rights Act 1996
- Remedy

Suggested answer

By s. 94 of the Employment Rights Act 1996 (ERA) all employees are entitled to a remedy for unfair dismissal (UD). This principle is not, however, completely followed through.

Qualifications

The applicant bears the burden of showing that she is qualified to bring a claim. There is little reason to doubt that Erica (E) is an employee. The question states that she has been employed (presumably continuously) for more than one year, the qualifying period for UD. As far as can be seen, she is not excluded for any other reason such as being a share fisherperson or being retired. She has it is assumed brought her claim within the time limit, three months from the effective date of termination, unless to bring it

within that time was not reasonably practicable. The conclusion is that she is qualified to claim.

Dismissal

The question explicitly states that she has been dismissed by her line manager. This type of dismissal, which has no accepted name, is sometimes called ‘direct’, ‘express’, or ‘actual’ dismissal and falls within s. 95(1)(a), ERA. Even if she had not been expressly dismissed, the giving of several warnings, if unjustified, could constitute a constructive dismissal: see *Walker v Josiah Wedgwood & Sons Ltd* [1978] ICR 744, EAT. A constructive dismissal according to *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761, CA, occurs where the employers evince an intention no longer to be bound by the contract or they breach a fundamental term, one of which is the duty of trust and confidence, which is breached by giving unjustified warnings. Since there is an express dismissal, no discussion is needed of any other type of dismissal. The burden of proving dismissal lies on the applicant.

Reason

If the employers cannot prove that they had one of the five potentially fair reasons for UD (six if one includes the special regime for age-related dismissals), they have no defence, and the tribunal will move to the final stage, that of remedy. If the employers can prove one of the reasons, they have not (yet) won because the fourth stage, that of reasonableness, must be considered.

On the facts the employers may seek to show incapability under s. 98(2)(a), ERA: E has been ‘getting slower at work’ and her spilling the coffee may demonstrate incompetence) or perhaps misconduct (s. 98(2)(b)): the question is not clear as to whether or not she deliberately spilt the coffee. (The question says that she ‘spills’ the drink, not ‘knocks over the coffee’ but it remains uncertain whether she acted intentionally or recklessly, which may demonstrate misconduct, or whether she was just careless, a form of incapability.) Incapability includes ‘skills’ (s. 98 (3)), and perhaps the slowness shows a lack of skill.

The reason is ‘the set of facts known to the employer or belief held by him which cause him to dismiss the employee’: *Abernethy v Mott, Hay & Anderson* [1974] ICR 323. If Freddie believes that they have dismissed on a certain ground, that ground is the reason for the purposes of UD. If a sham reason is given, the tribunal can look behind it. If there are two or more reasons, the tribunal has to say which was the principal or motivating cause: *Carlin v St Cuthbert’s Cooperative Association Ltd* [1974] IRLR 188. In an important decision the House of Lords held that if the employers advance several possible reasons and the tribunal does not accept one or more of them, the employers must prove that the remaining reason was the principal reason: *Smith v City of Glasgow DC* [1987] ICR 796. Employers cannot change the reason they give if to do so would not give the ex-employee enough of an opportunity to meet the allegation.

By s. 92, ERA the employers must in response to a request give the former employee the reason for dismissal within 14 days of the request. An unreasonable failure to supply reasons is remedied by the Employment Tribunal's awarding two weeks' pay if the claim is made within three months of dismissal. Unlike compensation for UD there is no cap on the amount of week's pay. The written statement of reasons is admissible in a tribunal (s. 92(5), ERA); and tribunals will draw their own inferences if they find that the reason the employers have given for this purpose differs from that provided for the purpose of defending the UD claim.

Reasonableness

Assuming that the employers can prove one of the five potentially fair reasons, presumably incapability, the tribunal must consider the reasonableness—fairness—of the dismissal, having regard to that reason and to the size and administrative resources of the employers and to equity and the substantial merits of the case. *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 remains a highly important authority. It makes the points that:

1. The tribunal should direct itself by reference to the words of s. 98(4), ERA.
2. It must look at the reasonableness of the employers' conduct, not at the fairness to the employee.
3. It 'must not substitute its decision as to what was the right course to adopt for that of the employer'.
4. It must in most cases apply the 'range (or band) of reasonable responses' test (if this employer dismissed and a reasonable employer may have dismissed, the dismissal is fair, even though another employer might have used a lesser sanction such as demotion, suspension, or loss of pay). This test was abandoned for a brief time in 1999–2000 but orthodoxy was reasserted by the Court of Appeal in *Foley v Post Office* [2000] ICR 1283.
5. It must act as an 'industrial jury', determining whether 'the decision to dismiss the employee fell within the range of reasonable responses which a reasonable employer might have adopted'.

When applying the guidelines in *Iceland*, the tribunal should bear in mind the equally famous phrases in *British Home Stores Ltd v Burchell* [1983] ICR 303n: did the employers believe the reason they gave? Did they have reasonable grounds for that belief? Did they carry out a reasonable investigation? Here, the employers may have believed the reason they gave for dismissing and may have had in mind reasonable grounds for that belief, but they do not appear to have carried out any investigation, never mind a reasonable investigation. In fact the third part of *Burchell* needs to be read more broadly than articulated by the Court of Appeal: did the employers act in a procedurally fair way? The leading authority was *Polkey v AE Dayton Services Ltd* [1988] AC 344, HL: employers had to act in a procedurally fair manner unless it was

utterly useless or futile to do so. Had Freddie's conducted an investigation, they might well have discovered the true reason for E's slowness: the double burden of work and family life. It would certainly not have been futile to uncover this reason for Freddie's could have reacted differently from the way they did, by, say, providing support. *Polkey* overruled the 'no difference' test laid down in *British Labour Pump Ltd v Byrne* [1979] ICR 347. By that test, if acting in a procedurally fair manner would not have made any difference to the outcome, dismissal, then the sacking was fair. This test made a comeback in the Employment Act 2002. If Freddie's dismiss, and it would not have made any difference to the result had they followed a fair procedure, then if they do follow the procedure stipulated in that statute, the failure to follow the non-statutory fair procedure will not make the dismissal unfair. The statutory fair procedure where there is not a dismissal for gross misconduct comprises three steps: the employer must send out a written statement of the reason for dismissal outlining the basis for that reason with an invitation to attend a meeting; there must be a meeting after which the employer must inform the employee of the reason for any decision and of the right to appeal; if the employee wishes to appeal, there is an appeal hearing. If the statutory procedure has not been followed, the dismissal is automatically unfair: new s. 98A of the 1996 Act, as inserted by the Employment Act 2002. This rule applies even though the employers would have dismissed anyway, had a fair procedure been adopted. The tribunal must award a minimum of four weeks' pay. If the employers do not follow the statutory procedure, the compensatory award must be increased by 10 per cent, unless there are 'exceptional circumstances' rendering it not just and equitable to award that percentage, in which event a tribunal may award such percentage as it thinks just and equitable; it may award an increase of up to 50 per cent if it is just and equitable so to do.

There are a couple of other procedural fairness points which should be mentioned. There was no consultation with E or with her union, if she was a member, perhaps the warnings were not precise enough (or they did not lead to increased supervision or training), and there was no appeal. It should be noted that by the now repealed s. 127A of the ERA, as inserted by the Employment Rights (Dispute Resolution) Act 1998, the compensatory award used to be reduced by up to two weeks' pay if the employee did not go through any internal appeals procedure but s. 127A was repealed when the 2004 procedures came into force.

Remedy

Part of this topic has been dealt with in the context of procedural fairness above.

The primary remedy for UD is reinstatement (same job back); if not, re-engagement in a similar job is the next option. On the facts reinstatement is possible; it may be what E wishes and would not seem impracticable for her to get her old job back. In fact the most common remedy for UD is the third one the tribunal should consider, compensation, which comprises a basic and a compensatory award. The basic award is calculated according to a set formula based on the applicant's age, the maximum

week's pay (currently £310), and the length of service. We are not told the exact age of E or how long she has worked at Freddie's, but having worked for only 'some years' she is unlikely to obtain anything near the maximum, currently £9,300. The basic award is subject to various deductions including any redundancy payment and any ex gratia payment.

The compensatory award is calculated according to the headings laid down by Sir John Donaldson in *Norton Tool Co. Ltd v Tewson* [1973] 1 WLR 45, NIRC: loss to the date of the hearing (including perks and expenses), future loss, loss of employability (see *Vaughan v Weighpack Ltd* [1974] ICR 261), loss of pension rights, and loss of accrued rights. Loss means 'economic' loss and does not include, for example, compensation for injury to feelings: *Dunnachie v Kingston upon Hull City Council* [2005] 1 AC 226 (HL), approving *Norton Tool*. From that figure are deducted various sums, e.g. for accelerated receipt, contributory fault (s. 123(6), ERA), if the applicant's employment would have ceased anyway (see s. 123(1), ERA, the 'just and equitable' principle), any ex gratia payment, and failure to mitigate. From 1 February 2007, the maximum for this award is £60,600, a figure which since 1999 has increased annually on 1 February in line with the Retail Price Index.

Question 4

Compare and contrast wrongful dismissal and unfair dismissal.



Commentary

This is a straightforward essay question. It is one that may be covered in different ways but should be the sort of question that any student ought to be able to answer. After all, dismissal is one of the core areas of employment law. An examiner would expect that all candidates could do a 'decent' answer and gain a 'decent' mark; the better student will always go for depth. Examiners have different ideas about subheadings in answers to essay questions. Find out what your university or college thinks. The authors believe that subheadings can help to provide a structure—and they ensure that the candidate deals with each subtopic and then moves on, rather than returning to earlier subtopics.



Answer plan

- Source
- Jurisdiction
- Qualifying period

- Limitation period
- Elements of each claim
- Remedies, especially compensation

Suggested answer

Source and consequences

Facts can give rise to both claims. For several reasons it is important to distinguish the claims. If both claims are brought on the same facts, normally the unfair dismissal one is stayed. Wrongful dismissal (WD) is a common law action for breach of contract; unfair dismissal (UD) is a creature of statute, originally the Industrial Relations Act 1971, now the Employment Rights Act 1996 (ERA). One consequence of the different source is that WD was until quite recently only heard in the ordinary civil law courts, the High Court or the county court, the distinction depending largely on the sum claimed, and UD was heard in the employment tribunals (ETs). However, after lengthy debate contractual claims for sums of £25,000 and under may now, as a result of the Employment Tribunals (Extension of Jurisdiction) Order 1994 (SI 1994/1623), be heard in the ETs. There are several caveats. First, the ETs and the ordinary courts have concurrent jurisdiction over such claims; therefore, it is incorrect to speak of the transfer of jurisdiction. Second, ETs can hear claims concerning breaches of the employment contract only if they relate to the termination of the contract, as WD does. They have no jurisdiction over claims arising during the running of the contract. Third, employers can bring counterclaims against their former employee. Fourth, ETs have no power to issue injunctions or declarations. As creatures of statute they do not have the inherent jurisdiction of ordinary courts. Fifth, certain claims relating to termination are excluded: covenants in restraint of trade, duties of confidentiality, copyright and other intellectual property claims, actions concerning living accommodation, and claims in respect of personal injury cannot be heard in ETs, even when they relate to termination of contract. Therefore, for example, a claim that a restraint of trade clause is invalid because the employee has been wrongfully dismissed (see *General Billposting Ltd v Atkinson* [1909] AC 118, HL) must be heard in the ordinary courts.

Until recently another difference between WD and UD was that legal aid was available for the former but not for the latter (assistance by means of the green form scheme was available), even when they were dealing with WD actions (though it was available for proceedings before the EAT). Legal aid was available for WD, which remains a contractual action. With the use of conditional fees it seems that such payments are rare in employment tribunals but more research is needed to determine the effect of the abolition of legal aid on WD claims. There was a longstanding debate whether legal aid should be extended to employment tribunals but governments of whatever persuasion set their minds against it largely on the ground of cost (but cf. Scotland). ETs have for a couple of decades been accused of increasing legalism, and more common use of

lawyers would lead to further accusations. Certainly when ETs, then called industrial tribunals, began to acquire employment law jurisdictions, the Donovan Committee, the Report of which led to the creation of the law of UD, thought that ETs should be informal as well as speedy and accessible. Certainly informality if not speed may be impeded by the use of lawyers; however, lawyers can also speed up proceedings because they know the law (unlike lay people) and they should be able to sort the relevant from the irrelevant.

Another consequence of WD's juridical base is that the time limit for bringing a claim in the ordinary courts is six years, whereas for UD it is only three months from the effective date of termination, subject to the 'not reasonably practicable' exception, a fairly narrow exception. In legal terms three months is a short period of time. If a lawyer does not submit the form IT 1 (renamed ET 1 from October 2005) in time, he or she is liable to be sued for negligence, i.e. the remedy lies against the adviser, and the UD claim fails. This time limit applies even though the employee is appealing against the dismissal internally. As part of its encouragement of grievance and disciplinary proceedings the government enacted the Employment Act 2002. Tribunals may have to be more flexible about time limits. Part of the government's justification for the revised procedure under the Act was that 64 per cent of the employers and employees had not had a meeting before dismissal and the first that employers often knew of the claim was that they received form ET 1. Unfortunately, these statistics are undermined as they do not take into account the fact that there may have been other methods of contact such as phone calls and emails. For more on fair procedure see below.

Dismissal: wrongful and unfair

A further consequence of WD's being a contractual action is that its foundation is a breach of contract. If there is no such breach, there is no WD. As with other contracts the breach of the contract of employment has to be one of a condition, not of a warranty. The terms 'condition' and 'warranty' are rarely used in employment law but the distinction nevertheless pervades dismissal law. As Lord Evershed MR said in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, CA, 'a contract of service is but an example of contracts in general, so that the general law of contract is applicable'. One effect of this juridical base is that dismissal is defined in terms of contract law: dismissal must be a breach of a fundamental term. Certain terms will always be fundamental, e.g. the duty to pay wages; others will be warranties; yet others may be innominate terms. For the purposes of WD the dismissal can be express as when the employers say: 'I sack you'; or it can be constructive as occurs when the employers repudiate the contract by evincing an intention no longer to be bound by the contract or they breach a fundamental term, entitling the employee to leave. Both forms of dismissal apply to UD, though repudiation is usually known as constructive dismissal. There is a third type of dismissal applicable to statutory claims only, expiry of a limited-term contract.

For WD if there is a dismissal, it must be ‘wrongful’; that is, the employers must have given no notice or insufficient notice. The length of the notice period depends partly on contract, partly on statute. Section 86, ERA states that if an employee has worked for under two years, the length is one week; over 12 years the period is 12 weeks; between two and 12 years the period increases by a week for every year of employment (e.g. the period is five weeks if the employee has worked for the employers for five years). If, however, the contract provides for a lengthier period, that period applies. The contractual term could be either express or implied; if implied, the period is of reasonable length and what is reasonable depends on the facts. Notice periods form one aspect of the ‘floor of rights’; they can be added to by contract, but not taken away by contract. However, s. 86(6), ERA provides that notice need not be given if the employers have a cause, a justification, for not giving notice on dismissal. In other words, they may dismiss summarily in certain circumstances. While there is no definitive list of causes, illustrations include theft from the employers (*Sinclair v Neighbour* [1967] 2 QB 279), taking industrial action (*Simmons v Hoover Ltd* [1977] QB 284), and disobeying a lawful order (*Macari v Celtic Football and Athletic Co. Ltd* [1999] IRLR 787). A series of incidents can amount to a cause, as in *Pepper v Webb* [1969] 1 WLR 514. Whether there is a justification depends on the facts of each case.

The basis of UD is statutory. Therefore, it is governed by statute. In a case where the dismissal is not automatically unfair, the employee must prove that he or she is qualified and has been dismissed. The burden of proof then switches to the employers to show that they had one of five possible potentially fair reasons: capability, conduct, redundancy, statutory illegality, and some other substantial reason. If the employers cannot prove that the reason they held fell within one of these five reasons, they lose at this stage and the tribunal moves to determine the remedy. If they can, the ET still has to determine fairness, applying s. 98(4), ERA.

Procedure

One of the reasons for the introduction of UD was the failure of WD to remedy a dismissal which was carried out in a procedurally unfair manner. While the emphasis on procedural fairness has changed over the years, until recently the main authority was *Polkey v AE Dayton Services Ltd* [1988] AC 344, HL, where it was said that a dismissal was unfair if the employers had not acted in a procedurally fair way even though they would have dismissed anyway, unless to go through a fair procedure would have been futile. The Employment Act 2002 partly reverses *Polkey*. A failure to follow the procedure laid down in that statute makes the dismissal automatically unfair: s. 98A(1), ERA, as inserted by the 2002 Act. (The remedy is four weeks’ pay if the ET considers that to be just and equitable: see the inserted s. 112(5), (6), ERA.) For the effect of the compensatory award, see s. 31 of the Employment Act 2002. However, a failure to follow a procedure beyond that laid down in the statute does not in itself make the dismissal unfair, reversing the rule

in *Polkey*. For further details see Question 2 of this chapter. But note that the statutory dismissal procedure is scheduled to be abrogated during the currency of this book.

Further distinctions

1. Coverage: WD applies to all those working under a contract; UD applies only to employees, and there are certain exceptions such as domestic servants who are close relatives of the employer.
2. There is no upper age limit in WD. There are special rules governing retirement on age-related grounds found in the Employment Equality (Age) Regulations 2006 (SI 2006/1031), which came into force on 1 October 2006.
3. The qualifying period for non-automatic UD is one year's continuous employment: Unfair Dismissal and Statement of Reasons (Variation of Qualifying Period) Order 1999 (SI 1999/1436). There is no qualifying period for WD.
4. If an employee is dismissed and brings a claim for UD in respect of the reason provided by the employers and wins, the employers cannot as it were retrospectively justify a UD by referring to a good reason to dismiss which they discovered after the dismissal: *W. Devis & Sons Ltd v Atkins* [1977] AC 931, HL. However, WD can retrospectively be justified in this way: *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, CA.
5. The remedy for WD, being a contractual action, is damages aimed at putting the claimant in the position she or he would have been in, had the contract been lawfully performed. The primary remedy for UD was intended to be reinstatement, and if not that, re-engagement in a similar job. In fact the remedy most often used is compensation consisting of a basic and compensatory award, the latter calculated according to the heads found in *Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45.
6. There is no limit on WD compensation but there is on UD: at the time of writing the basic award is restricted to £9,300 and the compensatory award to £60,600.
7. The compensatory award for UD includes compensation for the manner in which the employee was dismissed, if his or her employability is affected, but there is no such remedy in WD.

Conclusion

The differences between these two remedies derive from the juridical base of each claim. UD was instituted to remedy the defects of WD. However, sometimes it can be seen that UD is restricted too, particularly the financial cap on the compensatory award. For high earners the cap means that losses are not compensated, and there has in recent times been a revival of interest in UD partly for this reason.

Question 5

The courts and tribunals have construed the law of unfair dismissal in favour of employers. Discuss.



Commentary

Always check the type of questions you may be asked. Some employment law papers consist largely or solely of problems. The question invites a discussion of judicial interpretation of statute, not of the rights and wrongs of the law of unfair dismissal as stated in the Employment Rights Act 1996. Comparisons with wrongful dismissal and redundancy payments are likely to be otiose.



Answer plan

- (1) Judicial interpretation of the statute in favour of employees
 - Procedural fairness
 - Constructive dismissal
- (2) In favour of employers
 - The definition of 'employee'
 - The definition of 'some other substantial reason'
 - The 'range of reasonable responses' test

Suggested answer

The Employment Rights Act 1996 (ERA) and its predecessors have received various glosses by courts and tribunals over the years. Sometimes the construing has worked in favour of employees but it may be safely said that there are several aspects of judicial interpretation which reflect a judicial bias towards employers.

Sometimes interpretation is in favour of employees. An example is procedural fairness. There is no reference to this concept in s. 98(4), ERA. While the law has fluctuated (and see the changes made by the Employment Act 2002), a landmark authority was *Polkey v AE Dayton Services Ltd* [1988] AC 344, HL. If the employers dismiss in a procedurally unfair way, that sacking will be unfair unless it would have been futile or utterly useless to undertake a fair process. It may be rare for some element of procedural unfairness not to exist on the facts. For example, in *Charles Robertson (Developments) Ltd v White* [1995] ICR 349 an employee had been caught stealing on camera. Nevertheless, Holland J in the EAT was of the opinion that a disciplinary

interview had to be undertaken when the employee was long-serving and the crime was not of a serious nature. *Polkey* marked the high water mark of procedural fairness and the courts and tribunals have retreated somewhat since then. In *Duffy v Yeomans and Partners* [1995] ICR 1 the Court of Appeal held that the dismissing employers need not act in a procedurally fair manner if reasonable employers would not have done so. This ruling is one marking something of a return to the 'no difference' rule in *British Labour Pump Ltd v Byrne* [1979] ICR 347 that if going through a fair procedure would make no difference to the decision to dismiss, procedural fairness was not required. The enactment of the Employment Act 2002 is another twist in the story.

It can be added that sometimes interpretation which seemingly has gone in favour of one side or another has subsequently been reined in. The best example is the judgment of Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761, CA. He defined constructive dismissal as a breach of a fundamental term of the employment contract (or evincing an intention no longer to be bound). This determination, based largely on the words of the statute, overruled a line of authority which had held that it was sufficient that the employers acted unreasonably. Since breach of a fundamental term was thought to be harder to show than unreasonableness, which does not require the employee to prove a breach of contract, it was expected that fewer employees than previously would succeed in their claims. However, the development of implied terms over the last quarter of a century has led to the need for a breach of contract to exist. What would have not seemed a breach, but (merely) unreasonable conduct, may now be a breach of an implied term, particularly that of trust and confidence. Lord Hoffman in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, HL described this term as a 'default' one, i.e. it applies between all employers and employees unless expressly negated. It is now rare for unreasonable conduct not to be a breach of this or some other implied term. For example, in *Hilton International (UK) Ltd v Protopapa* [1990] IRLR 316, EAT telling off an employee in front of colleagues was a breach of the implied term of mutual respect. The breach must still be of a fundamental term. In *Cantor Fitzgerald International v Callaghan* [1999] ICR 639 the Court of Appeal said that breach even of a basic term such as that of pay could be insufficient to amount to a breach of a fundamental term where the employers had made a mistake or there had been a breakdown in their technology. It may also occur that what the *employee* thinks is a breach of contract is not. The principal example is *Dryden v Greater Glasgow Health Board* [1992] IRLR 469, EAT. The employers introduced a no-smoking policy. The applicant contended that they had done so in breach of contract. The tribunal held that the change was one of policy, not of contract, and therefore there was no breach of contract.

Instances of pro-employer interpretation are rife. Three instances have been chosen: the definition of 'employee', the definition of 'some other substantial reason', and the 'range of reasonable responses' test.

O'Kelly v Trusthouse Forte plc [1984] QB 90, CA is an example of a decision which could have been used to extend the protection of employment law to workers at risk but the court chose not to do so. 'Regular casuals' who worked when asked were held

not to be employees despite the fact that they were not in business on their own account and were under the control of their managers as to how they went about their work. It was said that there was no mutuality of obligation. However, they had no other job and would have lost offers of jobs from the employers had they refused them. They were economically dependent on the employers. The court could have ruled them to be employees, particularly as another category of workers were definitely self-employed, namely, those who came in on rare occasions; the workers at issue were much more like the full-time permanent staff.

The term 'some other substantial reason' (SOSR) is undefined in the statute. It does, for example, include dismissal at the behest of a customer (e.g. *Dobie v Burns International Security Services* [1985] 1 WLR 43) and reorganizations in the interest of efficiency which are not for redundancy (e.g. *Hollister v National Farmers Union* [1979] ICR 542). Even unilateral changes by management to contractual terms can be SOSRs, as in *RS Components Ltd v Irwin* [1973] ICR 535. These cases demonstrate the width of the category of SOSR and show that even when the employers act in breach of contract there may still be a SOSR. The courts could have restricted SOSR to matters similar to the other four potentially fair reasons. After all the reason has to be 'some other' reason, and lawyers should interpret this phrase *eiusdem generis* with the previous items in the list. Similarly, the reason must be a 'substantial' one but sometimes the reason has not been very substantial. The Court of Appeal in *Kent CC v Gilham* [1985] ICR 227 held that a reason was not substantial only when it was 'trivial or unworthy', a very low hurdle. For example, when dealing with dismissal for efficiency gains, the EAT in *Chubb Fire Security Ltd v Harper* [1983] IRLR 311 asked whether the employers had a reasonable belief that dismissing the employee would be more beneficial to them than the detriment it would be to the employee. It will be strange if an employer did not so believe when dismissing in the interests of efficiency. Besides these criticisms the class of SOSR may be attacked for not being a closed category and for covering instances of dismissal not in accord with modern mores (or even the truth). *Saunders v Scottish National Camps Ltd* [1981] IRLR 277 illustrates both points. The employers dismissed a male homosexual because they believed that such a person was more predatory towards children than was a male heterosexual. The Court of Session held that the employers had a SOSR despite the lack of supporting evidence.

Finally, the 'range of reasonable responses' test found in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 gives a large degree of discretion to employers. If reasonable employers may have dismissed on the instant facts and these employers did, then the dismissal is unfair, no matter whether the members of the employment tribunal think that the dismissal was unfair. There is no reference to this test in s. 98(4), ERA, and over the years the test has come in for trenchant criticism. Nevertheless, it still remains the test despite favouring employers and one might have thought that the purpose of the law of unfair dismissal was to favour dismissed employees!

As can be seen the courts and tribunals have not uniformly been pro-employer but it is suggested that the number of pro-employer judgments outweigh the pro-employee judgments.

Question 6

Mick has worked for Frosty Ltd, a painting and decorating firm run by Liam, for many years. He does the joinery work. One day another employee, Kevin, tells Liam that he knows as a fact that Mick has been doing a 'foreigner' for his aunt; that is, working in his time for himself using Frosty's materials and not attempting to gain the customers for the firm. Liam put a phone call through to the aunt, who stated that Mick had done the work. Liam dismisses him with instant effect. Liam later makes enquiries of the firm's clients and finds that Mick has done such work on many previous occasions.

Jane was employed some months ago on a one-year contract as a painter. Liam has found that quite a lot of the work has been defective and repairs have been quite expensive. Liam tells Jane that her contract will not be renewed when the term expires.

Ivan, who joined the firm some years ago as senior contracts negotiator, was injured in a car accident a short while ago. While the injuries are not serious and Ivan is expected to recover completely very soon, Liam decided that he could not wait any longer for Ivan to get better and he sacked him, replacing him with Hetty. He gave Ivan the correct length of notice. Ivan complained bitterly in the meeting he had with Liam before being dismissed that Liam should have let him have a friend to plead his case and that Liam should not have acted without a medical report.

Advise Frosty Ltd. Assume that the provisions of the 2002 Employment Act do not apply.



Commentary

This is a question about dismissal, and there may be both unfair dismissal and wrongful dismissal. Note, however, that unless the dismissal is for an inadmissible reason, in respect of Jane there will be no unfair dismissal because she has not been employed by Frosty for one year continuously and that in relation to Ivan there is no possibility of a wrongful dismissal because the correct length of notice has been provided.

The provisions of the 2002 Act came into force in October 2004. To avoid repetition they are dealt with in the other questions which examine unfair dismissal.



Answer plan

- Mick
 - Wrongful dismissal: summary dismissal, breach of the implied duty of faithful service, breach of fundamental terms and the non-provision of notice, the effect of after-discovered reasons
 - Unfair dismissal: the different effect of after-discovered reasons, potentially fair reasons including qualifications, dismissal and misconduct, the s. 98(4) ERA 1996 test and procedural fairness, remedies including deductions
- Jane

- Unfair dismissal: qualifications, expiry of a limited-term contract is a dismissal, illness is incapability (and possibly frustration: see Ivan, below)
- Ivan
 - Illness may be frustrating event; if not, it is incapability for the purposes of unfair dismissal
 - Right to be accompanied
 - Wrongful dismissal: forum

Suggested answer

Mick

Mick is dismissed ‘with instant effect’; therefore, there is a possibility of wrongful dismissal because the correct length of notice has not been provided by Frosty. However, he has breached the duty of fidelity, the implied term which provides that an employee must serve his or her master in good faith. Breach of this term is a breach of a fundamental term, entitling the employers to dismiss summarily. Where there is such a breach there is no wrongful dismissal and s. 86(6) of the Employment Rights Act 1996 (ERA) provides that no statutory period of notice need be given when the employee is in breach of such a term. Even if one act of moonlighting is not such a breach and therefore one which justifies the failure to give the correct length of notice of dismissal, the discovery post-dismissal that Mick has done many similar jobs retrospectively validates an otherwise wrongful dismissal: *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339, CA. Mick therefore has no claim for wrongful dismissal.

In relation to unfair dismissal, a potentially fair reason to dismiss discovered after the dismissal does not retroactively make fair that which would otherwise be unfair but compensation may be reduced: *W Devis & Sons Ltd v Atkins* [1977] AC 931, HL. Mick is qualified to bring such a claim: he is an employee, as the facts state (‘another employee’); he has worked for several years, i.e. more than the one-year qualification period laid down in the Unfair Dismissal (Variation of Qualifying Period) Order 1999 (SI 1999/1436); he does not belong to an excluded category such as share fisherpersons; presumably he is below the normal retiring age and he has brought the claim within the prescribed period, three months, unless it was not reasonably practicable to bring the claim within that period. The burden of proving that he is qualified lies on Mick. He must also prove that he has been dismissed within s. 95, ERA. On the facts there is a ‘direct’, ‘express’, or ‘actual’ dismissal. At that point the burden switches to Frosty to prove that they have a potentially fair reason, which on the facts will be conduct, one of the five reasons laid down in s. 98, ERA. Their argument at this point is that by doing ‘foreigners’ he has so misconducted himself that it is reasonable to dismiss him. Section 98(4) ERA 1996 provides that the tribunal must take into account the size and administrative resources of Frosty and must decide according to equity (meaning fairness, not the rules of equity) and the substantial merits of the case. The employers must act within the

bounds of reasonableness responses: *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT, which the Court of Appeal confirmed in *HSBC Bank plc v Madden* [2000] ICR 1283. The tribunal must also apply the tests laid down in *British Home Stores Ltd v Burchell* [1980] ICR 303n, EAT, as often approved by the Court of Appeal: did Frosty genuinely believe that Mick did the misconduct in question? (Here they did, relying on what another employee had told Liam.) Did they have reasonable grounds for that belief? (Here it can be said that they did not form their belief negligently because they checked the facts; therefore, they had reasonable grounds.) And did they conduct such an investigation into the misconduct as the facts reasonably warranted? It is suggested that this third part of the test may lead to a finding of unfair dismissal. *Polkey v AE Dayton Services Ltd* [1988] AC 344, HL provided that employers had to act in a procedurally fair manner unless it was utterly futile so to do. The coming into force of the Employment Act 2002 affected this proposition. See Question 2 in this chapter and see also the ACAS Code of Practice No. 1, *Disciplinary and Grievance Procedures*. The 2004 version takes into account the 2002 Act. Perhaps if Frosty had held such an investigation, they might have discovered all kinds of reasons for Mick's doing the work. For example, perhaps his aunt did not allow non-family into her house; perhaps she could not afford the prices charged by companies but Mick did the work for free. If the sacking was unreasonable within s. 98(4), ERA, the tribunal must look at the remedies. (These are discussed elsewhere in this chapter and are not repeated here.) When the tribunal is making deductions, there should be one for contributory fault known at the time of dismissal (s. 122(2), ERA in respect of the basic award and s. 123(6), ERA in respect of the compensatory award) and in respect of the fact that Frosty found other dismissible instances of misconduct post-dismissal. That type of fault is taken into account in the general 'just and equitable' sum provision found in s. 123(1), ERA. See *Tele-Trading Ltd v Jenkins* [1990] IRLR 430, CA for this distinction. The deduction under s. 123(6) should be made before that in s. 123(1) because a deduction under the former may affect what is just and equitable under the latter: *Rao v Civil Aviation Authority* [1994] ICR 495, CA.

Jane

The expiry of a limited-term contract is deemed by statute (s. 95(1)(b), ERA) to be a dismissal for the purposes of the law of unfair dismissal if it is not renewed. Here the contract will not be renewed. Therefore, there is the possibility of a claim for unfair dismissal. In that event the law stated when discussing Mick applies here too, e.g. qualifications (when the contract expired, Jane would have one year's continuous employment as required by the Regulations noted above), the reason for the dismissal (here capability), reasonableness of dismissal including procedural fairness, and remedy. It is quite likely that Jane has been unfairly dismissed because on investigation, which does not appear to have occurred, Frosty might have found that she was untrained or unsupervised or both. Further discussion of incapability occurs below: illness is deemed to be incapability by s. 98(3), ERA.

There can be no claim for wrongful dismissal because the non-renewal of a fixed-term contract does not constitute a dismissal for the purposes of that action.

Ivan

Ivan is dismissed for incapability arising out of injuries caused in a car accident. As stated above illness is deemed to be incapability. It is suggested that the contract has not been frustrated by the injuries for, although injuries may be a frustrating event, the facts do not demonstrate that performance of the contract is radically different from that which the parties agreed. Accordingly, the dismissal is a true dismissal, not one which could be called a reaction to the events which amounted to frustration. In that event as with the other two employees the law of unfair dismissal comes into play. Ivan appears to be qualified and he has been dismissed. There has been no consultation, which will render the dismissal unfair (*East Lindsey DC v Daubney* [1977] ICr 566, EAT), unless consultation would have made no difference to the result: *Taylorplan Catering (Scotland) Ltd v McNally* [1980] IRLR 53, EAT. It is suggested that Liam has been too precipitate in not consulting and in not waiting for a medical report. Liam also does not seem to have conducted any enquiry or sought alternative employment for Ivan, though no job need be created for him: *MANWEB v Taylor* [1975] ICR 185, DC. The normal remedies are available.

If the request to be accompanied was a reasonable one, Ivan may bring a claim to the tribunal. Failure by employers to accord this right is compensated by up to two weeks' pay: ss. 10–11, Employment Relations Act 1999. However, this right is restricted to being accompanied by a colleague or trade union official, not by a friend. The three months' time limit applies with the usual 'not reasonably practicable' exception.

Since the injuries are not likely to last for a year the Disability Discrimination Act 1995 does not affect the current law as applied to the facts.

Depending on the length of employment ('some years') Ivan will be entitled to the correct length of notice under statute or under contract, depending on which is the longer. Since that notice has not been given, there is also a wrongful dismissal action available. Claims are made in the ordinary courts or if the claim is for below £25,000, is not one of the claims excluded from the jurisdiction of the employment tribunals, and is on termination of the contract of service, in the employment tribunal. Since the claim may well be for damages equivalent to only a few weeks' notice, despite the concurrent jurisdiction the claim may well be brought before the latter forum.

Question 7

ANSWER BOTH PARTS

- (a) 'The tribunals have striven to apply the Employment Act 2002 (Dispute Resolution) Regulations 2004 (SI 2004/3426) in such a way that justice has not been thwarted by the

wording of the Regulations but interpretation has sometimes been stymied by the wording of the Regulations.'

Discuss.

[60%]

AND

(b) The Department for Business, Enterprise and Regulatory Reform (DBERR), previously the Department of Trade and Industry (DTI), is engaged in a consultation process with a view to abolishing the 2004 Regulations, as recommended by the Gibbons Report. Why did the Gibbons review come to the conclusions that it did and which recommendations has it proposed to take the place of the Regulations?

[40%]



Commentary

The question is in two parts and both must be tackled. If, say, half the marks are allocated to each part of the question then, if you answer one part at first class level but do not answer the second part, you are heading for a fail. For example, assume that the marker has allocated 50% of the total marks to (a) and 50% to (b): if the candidate answers one part only, then immediately 50% of the marks are lost; a first class answer (70%) to the other part will result in only a mark of 35%, a fail. Some law schools add at the end of each sub-question the amount of marks allocated to each part and, if so, you should allocate approximately the same proportion of your total answer to each part.

Part (a) does not ask for an outline of the law (on which see **Question 2** in this chapter) except in so far as a summary of the Regulations is needed to understand the tribunals' interpretation of the Regulations. If you do not know your cases, you should not tackle this question. Part (b) looks to an exposition of the Gibbons Report on dispute resolution. Again, a general outline of the Regulations will not in itself gain many marks.

In order to guide the reader through the answer the authors recommend using sub-headings even in essay-style answers (contrary to what the reader may have been taught at school).



Answer plan

- The standard and modified statutory discipline and dismissal procedures including the uplifts
- The effect of s. 98A(2) of the Employment Rights Act 1996
- The standard and modified statutory grievance procedures
- The Gibbons Review (2007) with an outline of the major recommendations.

Suggested answer

(a)

Introduction

Though there have been no decisions of the Court of Appeal or House of Lords (or of the Court of Session in Scotland) on the 2004 Regulations and though several aspects of them have not received judicial construction (such as the interpretation of the modified statutory discipline and dismissal procedure), the Employment Appeal Tribunal (EAT) has delivered a good number of judgments on their interpretation. It is the objective of this answer to see whether or not the tribunals have been obliged to construe the Regulations in such a manner that the words of the Regulations do not impede justice, which after all is stated to be the ‘overriding objective’ of employment tribunals.

Statutory discipline and dismissal procedures (SDDPs)

The SDDPs apply only when the employers are contemplating disciplinary action or dismissal. Employers who commence capability proceedings against an employee do not contemplate dismissals, even though the end of the process may be a dismissal: *South Kent College v Hall* EAT/0087/07. Therefore, the law on SDDPs does not apply.

The SDDPs do not apply in certain other circumstances, one of which occurs when the employee is constructively dismissed within s. 95(1)(c) of the Employment Rights Act 1996. In that event the Statutory Grievance Procedures (SGPs) apply. However, in turn SGPs do not apply if the employers are contemplating ‘actual’ dismissal. Where the employee resigns because she knows that she will shortly be dismissed, it was said *obiter* in *Brock v Minerva Dental Ltd* [2007] ICR 917 (EAT) that neither the SDDPs nor the SGPs apply.

When the standard SDDPs do apply, cases from the EAT stress that Step 1, the letter, is very easy for the employers to deal with. In one of the landmark authorities, *Alexander v Bridgen Enterprises Ltd* [2006] ICR 1277, Elias P. stated:

... the employee simply needs to be told that he is at risk of dismissal and why. In a conduct case this will be ... 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.

This is a minimal requirement, and one made even more so by the decision in *Draper v Mears Ltd* [2006] IRLR 869 that the letter need not specify on its face to, for instance, the alleged misconduct but it may refer, as here, to ‘last Tuesday’s events’. On the previous Tuesday the employee had been caught redhanded and he knew in that context what ‘last Tuesday’s events’ were. The case of *Patel v Leicester City Council* EAT/0368/06 stresses the minimal nature of the requirement that the employers send the employee a letter. The employers were dissatisfied with the employee’s performance and they put her on a redeployment register; they sent her a letter saying that she would be dismissed if they could not find her another post. The

EAT held that this letter constituted step 1 of the SDDPs even though it was by no means certain that she would be dismissed and indeed the employers were seeking to redeploy her.

Step 2, however, requires more than step 1 because the employers must tell the employee of the 'basis' of the reason for dismissal. Again *Alexander* is helpful. Elias P said that in a misconduct case all that was needed was that the employee knew what she was being accused of so that she could put her side of the story. In a redundancy scenario, as *Alexander* was, the employers must explain why redundancies are needed and why the employee is at risk of being made redundant. On the facts of the case, employees had been told the criteria for selection for redundancy but not their scores under those criteria and the EAT held that they had been automatically unfairly dismissed. However, the employee must be given a reasonable opportunity to respond to criticism and providing her with the case against on the morning of the hearing did not give her such an opportunity: *Bowen v Millbank Estate Management Organisation* EAT/0032/07. Accordingly the dismissal was automatically unfair, and it made no difference that she was allowed after the meeting to make representations that the panel took into account before reaching its decision.

Step 2 was widely construed in favour of the employers in *Patel*, above. The employee asked for a meeting with her employers and she raised the question of why they were taking so long to redeploy her. The EAT held that this meeting constituted step 2 despite the meeting being at the request of the employee and despite the meeting covering issues other than possible dismissal.

Draper v Mears, above, demonstrates that if the employee has sufficient information to meet the allegation, there is no need for step 1 and step 2 to be in sequence.

The SDDPs must be restarted where the employee is undergoing a disciplinary and new accusations are made during the SDDP: *Premier Foods Ltd v Garner* EAT/0389/06, a pro-employee decision.

According to the Regulations the employers must give the decision to dismiss 'after the meeting'. However, the EAT held in *Dugdale plc v Cartlidge* EAT/0508/06 that it was not a failure by the employers to abide by step 2 if they announce their decision at the end of the meeting. Here the EAT is seeking to get round the drafting of the Regulations in order to promote a common-sense interpretation of the Regulations. The effect, however, is to construe the provision in the employers' favour.

Step 3 is the appeal. Perhaps surprisingly, if the employee does not avail herself of the appeal stage of the SDDPs, she may and almost certainly will receive reduced unfair dismissal compensation because she is at fault for not completing the relevant SDDP. Moreover, the appeal must be made without unreasonable delay. What is unreasonable is a question of fact for the employment tribunal and the issue of whether a delay of six months was unreasonable was remitted to the tribunal in *Patel*, above; see also *Khan v Home Office* EAT/0026/06.

'A procedure'

Where the employers comply with the SDDPs, the next issue concerns the effect of s. 98A(2), which stipulates that a failure to follow 'a procedure' does not of itself make the dismissal unfair provided that the employers show that they would have dismissed if they had followed the procedure. 'A procedure' means any procedure (*Kelly-Madden v The Manor Surgery* [2007] ICR 207 (EAT) following *Alexander*, above, and disapproving *Mason v Governing Body of Ward End School* [2006] ICR 1128 (EAT)). Therefore, to comply with s. 98A(2) the procedure need not be in writing or be in any way formal. The effect of placing the burden of proof on the employers was demonstrated by the EAT decision in *YMCA Training v Stewart* [2007] IRLR 185. The employment tribunal found that the claimant stood a 60 per cent chance of being dismissed. The EAT held that the effect of finding that the employers were more likely than not to dismiss rendered the dismissal fair. It is not just the compensation is reduced by the percentage chance of being dismissed.

The uplifts for failure to comply with the SDDPs

Section 31 of the Employment Act 2002 governs increases and decreases in compensation where one party has failed to follow the correct statutory procedure. The EAT in *Metrobus Ltd v Cook* EAT/0490/06 held that the uplift for non-compliance with the SDDPs was penal in nature and on the facts an increase of 40 per cent was justified where the employers were in serious default of their obligations. A serious default would be for example a refusal to start on the SDDPs process or a refusal to hear an appeal. Contrariwise, the EAT in *Bainbridge v Redcar & Cleveland BC* [2007] IRLR 494 reduced a 5 per cent uplift to a 0 per cent one when the meeting between the parties would have been useless because they were involved in an equal pay claim and it would not have been possible to reach any decision without the employees' solicitor being present. This was therefore not just one of those exceptional cases where an increase of under 10 per cent was appropriate but one where a nil uplift was awarded because any meeting was futile.

It should be noted that compensation can still be reduced for contributory fault (and under the principle in *W. Devis & Sons v Atkins* [1977] AC 971 (HL)) even if the effect is to reduce the amount awarded to nothing; *Ingram v Bristol Street Parts* EAT/0601/06, *obiter*. The effect is therefore that any uplift is made nugatory.

Statutory grievance procedures**The standard SGP**

The EAT has read the requirement for there to be a grievance widely, an interpretation in favour of employees. For example, it is sufficient that the employee is complaining about something, and the document in which the employee is complaining need not be called a grievance: *Galaxy Showers Ltd v Wilson* [2006] IRLR 83. A request for flexible working may constitute a grievance: *Commotion Ltd v Ruddy* [2006] ICR 290. A resignation letter can be a 'grievance': *Shergold v Fieldway Medical Centre* [2006]

ICR 304; so too can a solicitor's letter before action (*Mark Warner Ltd v Aspland* [2006] IRLR 87 and even a 'without prejudice' letter (*Arnold Clark Automobiles Ltd v Stewart* EAT/0052/05). The employee need not have written the letter herself: *Mark Warner*. In the case of a dyslexic employee a grievance was made when he told his manager of his grievance and the latter wrote it down. There is no need to use the employers' grievance form: *Thorpe v Poat* EAT/0503/05. However, an ET 1, a claim form, is not a grievance for the purposes of the SGP: *Gibbs v Harris* EAT/0023/07. Similarly, a discrimination questionnaire such as one in respect of disability is not a grievance: *Holc-Gale v Makers Ltd* [2006] ICR 462.

A related question is this: if there is a grievance, what does that grievance cover? In *Canary Wharf Management Ltd v Edebi* [2006] ICR 719 the EAT held that a grievance about the physical conditions of work did not cover disability discrimination. As Elias P. put it: 'If the statement cannot in context fairly be read even in a non-technical and unsophisticated way as raising the grievance that is the subject-matter of the... complaint, then the tribunal cannot hear the claim.' However, the tribunal does have jurisdiction when the complaint in writing did not refer to an equal pay grievance but that complaint had to be read in light of a previous conversation about equal pay between the employee and a manager of the employers: *Serco Group v Wild* EAT/0519/06. The authorities are not clear-cut on whether a grievance can cover matters after the complaint was brought. Perhaps the most reasoned case is *Galaxy Showers*, above, where the EAT held that where the grievance was a letter threatening resignation if the employers did not act as the employee required, he would resign, the tribunal had jurisdiction over the constructive dismissal when the employee did resign.

The cases are not definite as to whether the SGP must be used when one of the respondents is not the employers but, for instance, is a line manager. The (Scottish) EAT said in *Bissett v Martins* EAT(S)/0022/06 that the SGP did not apply and the EAT sitting in London is divided: *Odoemelam v Whittington Hospital NHS Trust* EAT/0016/06 agreed with the EAT in Scotland but another division of the EAT disagreed in *London Borough of Lambeth v Corlett* EAT/0396/06.

The modified SGP

Unlike the complaint in the standard SGP, the modified SGP requires the employee to set out the basis of the grievance. In *Bradford City Council v Pratt* [2007] IRLR 192 EAT the employee had brought a grievance about equal pay; she then resigned, and agreed that her grievance should be treated under the modified SGP. However, on her claim form she did not note who her comparators were. The EAT upheld the contention of the employers that she had not laid down the basis of her grievance; therefore, the tribunal did not have jurisdiction. Because the date for bringing the claim had now passed, the employee could not bring another claim and she lost her case. This case is an illustration of how the drafting of the Regulations have prevented justice from being granted—the technicalities have defeated the expectation of justice.

(b)

Introduction

The committee chaired by Michael Gibbons reported in March 2007 (*Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain*, URN 07/755) and what was then the DTI immediately issued a public Consultation Paper basically requesting argument in favour of and contrary to the proposals with a deadline for responses in June 2007. At the time of writing the outcome of the consultation process is not known but it is expected that the Government does intend to abolish the 2004 Regulations, and it has already announced that there will be an Employment Simplification bill in the 2007–08 Session of Parliament and this bill could be the vehicle for the abolition. However, come what may, there is very little chance of the repeal taking place before some time in 2009 (i.e. during the currency of this book) and, in particular it is uncertain whether s. 98A(2) of the Employment Rights Act 1996, as inserted by the Employment Act 2002, will be retained or replaced. This subsection provides that a dismissal may be fair even when the employers have acted in a procedurally unfair manner by not following rules of procedure (such as their own) which differ from the statutory minimum found in the 2002 statute and the 2004 Regulations.

The recommendations of the Gibbons Review

In his foreword Gibbons wrote:

The headline recommendation is the complete repeal of the statutory dispute resolution procedures set out in the 2004 Dispute Resolution Regulations. I also present a suite of complementary recommendations which, in aggregate, are genuinely deregulatory and simplifying. If implemented, they should reduce the complexity of the current system and reduce costs to business and employees. They uphold and preserve all existing employee rights and ensure access to justice.

The Report considered that the intention behind the 2004 Regulations was ‘sound’ but that the implementation of that intention had been ‘inappropriately inflexible and prescriptive’. The aim had been to increase early resolution but the result had been that formal processes had come to be used when less formal ones would have led to earlier resolution. The review noted the following problems with the Regulations:

1. They ‘exacerbate and accelerate disputes’ because the parties concentrate on getting the SGPs and SDDPs correct rather than focus on settling the dispute amicably.
2. ‘complexity drives users to seek legal advice earlier with associated increased costs’ (for example, is a complaint made on a 360 per cent feedback form a grievance?).
3. ‘the Regulations are not relevant to all situations’ (an example was the appeal stage in small businesses where the appeal could not be heard by a person who heard the original complaint but also noted were situations in which there were

multiple claimants, where it was burdensome to go through the process for each individual claimant, and cases where both disciplinary action and grievances were taking place at the same time e.g. an allegedly discriminatory discipline procedure: in such instances it was not always clear whether both the SGP and the SDDP had to take place).

The tribunals also were not helpful in this regard. ‘The overwhelming view of those the Review spoke to was that tribunals are increasingly complex, legalistic and adversarial making them a daunting experience for many.’ (para. 1.41) Sometimes, indeed, the Regulations were inappropriate, e.g. on the expiry of a limited-term contract and on redundancy. Any proposals for reform had to be simpler and less prescriptive while keeping to the objective of resolving workplace disputes as early as possible in order to reduce disruption to businesses and to employees’ careers and to save money: the Report noted that 42 per cent of respondents to a survey (DTI, *Employment Rights at Work—Survey of Employees* (2005)) reported a problem at work within the last five years and that the cost of defending an employment tribunal claim was some £9,000: PricewaterhouseCoopers/BRE *admin burdens measurement exercise* (2003). The latest figure for legal fees is £4,360: DTI, *Survey of Employment Tribunal Applications* (2005). Gibbons recommended also

1. Purely monetary disputes should be dealt with swiftly without the need for a tribunal hearing, perhaps by a legally qualified adjudicator acting under the supervision of a tribunal chair.
2. The advice via the web, guidance, and a helpline provided to all parties should be improved.
3. In-house alternative dispute resolution mechanisms such as mediation should be encouraged.
4. A free early resolution service should be established by the government and that should include mediation.
5. The fixed periods of ACAS conciliation should be abolished.
6. The behaviour of the parties should be reflected in costs orders.
7. The claim and response form should be simplified.
8. Employment tribunals should be given power to deal with cases involving multiple claimants.
9. The situations in which tribunal chairs may sit alone should be reviewed so that lay members should sit only when they add value.
10. Time limits should be unified.
11. Powers to deal with weak and vexatious cases should be reconsidered so that the tribunals use them consistently.
12. And, finally, employment law should be simplified (!).

Further reading

Collins, H., *Justice in Dismissal* (Oxford: Clarendon, 1992).

Ewing, K. D., 'Remedies for breach of the contract of employment' [1993] CLJ 405.

Pitt, G., 'Justice in Dismissal: a reply to Hugh Collins' (1993) 22 ILJ 251.

Smith, I. T., and Thomas, G., *Industrial Law*, 8th edn (Oxford: Oxford University Press, 2003), ch. 8, pp. 494–622.