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THOMPSONS  
SOLUTIONS

DISPUTE RESOLUTION

GUIDE TO THE NEW RULES

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## Policy context

1. Legislation results from DTI "Routes to Resolution" and flawed DTI research into lack of use of internal grievance and disciplinary procedures.
2. Supposed to encourage use of workplace dispute resolution procedures, but actually aimed at discouraging Tribunal applications by erecting barriers to access
3. Law Society and TUC warned that law was badly-made and would exclude well-merited claims.
4. TUC is very concerned that regulations on exemptions and deemed compliance are too complex for average lay official, so will advise full compliance in (practically) all cases
5. TUC aims to campaign in light of almost certain chaos and injustice.

## Preliminary points

6. The procedures are linked to the Tribunal jurisdictions listed in Schedules to the 2002 Act. These cover almost all individual rights claims, save that none mentions grievances over the right to work flexibly. This means that there is no obligation on an employee to use the GP before lodging an ET1 e.g. that the employer failed to consider the request. Equally, there is no obligation on an employer to respond to a grievance if the employee raises one. However the employee would have to raise a grievance if alleging that the employer's failure or refusal breached equality legislation.
7. The DDP will apply where the employer first contemplates dismissing or taking relevant disciplinary action against an employee on or after 1 October 2004. So if the employer initiates disciplinary action on or before 30 September, the DDP will not apply.
8. The GP will apply where the action about which the employee complains occurs on or after 1 October; or where it occurs or continues on or after that date unless the employee raised a grievance on or before 30 September.

## Overview

9. Procedures apply only to "employees" but no small employer exemption
10. Standard DDP has three steps: a written charge, a meeting, an appeal
11. DDP applies to dismissals (for any reason) save constructive dismissals
12. DDP does not apply to oral or written warning or to suspension on full pay
13. DDP applies to other action short of dismissal (e.g. demotion, loss of pay) based on employee's conduct or capability = "relevant disciplinary action"
14. Two-step modified DDP applies only to justified instant dismissals
15. Standard GP has three steps: a written grievance, a meeting, an appeal
16. Two-step modified GP applies by agreement where employment has ended without standard GP being completed
17. GP applies to employee's grievance about employer's act or omission that could form basis for ET complaint, including constructive dismissals but not direct dismissals
18. If GP applies, employee must write Step One letter and wait 28 days before lodging ET1, otherwise the Tribunal will not accept it.
19. If any procedure applies, ET1 time limits are extended by three months
20. Correspondence and meetings can count for both procedures e.g. a disciplinary meeting can double up as a grievance meeting. However an employer cannot discipline an employee without initiating the DDP.
21. Compensation is increased or reduced by a party's failure to use or complete the applicable procedure before the ET1 is lodged
22. Employer's failure to follow DDP renders dismissal unfair, but otherwise unfair dismissal law is weakened
23. Government has not implemented the section that would have incorporated the procedures into contracts of employment.
24. Legislation triggered a revised ACAS Code of Practice, which has now been laid before Parliament.

## The Procedures

25. Standard DDP comprises three steps: employer gives written statement of charge and invites employee to a meeting; meeting takes place and employer informs employee of decision and of right to appeal; employee appeals, appeal takes place and employer informs him/her of final decision
26. Disciplinary action (other than suspension) cannot take place before the first meeting but can take place before the appeal meeting
27. Under two-step modified DDP, employer gives written statement of misconduct that led to dismissal; employee appeals and after a hearing the employer informs him/her of final decision
28. Standard GP comprises three steps: employee gives written grievance to employer; employer invites employee to a meeting and informs him/her of decision and of right to appeal; employee appeals and employer informs him/her of final decision
29. Under two-step modified GP, employee gives written grievance to employer; employer gives written response to employee i.e. no meeting
30. For each of the four procedures, the employer and employee must take action without unreasonable delay; timing and location of meetings must be reasonable; meetings must be conducted so that each side can explain their case; and as far as reasonably practicable, appeals should be heard by a more senior manager than attended the first meeting.
31. Each procedure must be triggered in writing, but thereafter lodging an appeal and (save in modified GP) the employer's decision can be oral.
32. Meetings under the procedures count as hearings for the right to be accompanied. This means that an employee can use the right to postpone a meeting/hearing (*once*) for up to five days if the companion will not be available. Furthermore, where either party cannot attend the meeting due to a reason unforeseeable when the meeting was arranged, that does not count as a failure to comply with the procedure.
33. The employer then has to invite the employee to a second meeting and, where the employee has postponed under the '99 Act, that meeting should be at the reasonable alternative time proposed by the employee.
34. If either party cannot attend the second meeting due to an unforeseeable reason, there is no need to try again and both are treated as having complied with the relevant procedure.
35. But if the employee fails to take reasonable steps to attend a meeting, the employer is under no obligation to comply with any further procedural step and the employee will be treated as at fault and so at risk of a reduction in compensation.

## Dismissal and Disciplinary Procedure

36. DDP applies where the employer *contemplates* dismissing or taking relevant disciplinary action. This should prevent an employer arguing that they only decided at an advanced stage to go beyond a warning.
37. "Dismissal" means all direct dismissals (including expiry and non-renewal of fixed term contracts), regardless of the grounds. So if the employee believes that the dismissal was discriminatory (e.g. pregnancy/maternity, or on grounds of race), he/she should appeal under the DDP. However constructive dismissals fall under the GP, not the DDP.
38. Apart from dismissals, DDP applies [only] to "relevant disciplinary action" [RDA] i.e. action on ground of employee's conduct or capability, beyond an oral or written warning or suspension on full pay. So the DDP will apply where the employer contemplates a disciplinary demotion, suspension without pay, loss of benefits, exclusion from promotion or pay rise. Unclear whether the DDP applies to a performance improvement plan or stricter supervision, or to suspension on full salary with the loss of a company car. See below for grievances arising from disciplinary action short of dismissal.
39. The modified DDP applies *only* to the very rare case of a Justified Instant Dismissal i.e. summary dismissal as soon as employer became aware of employee's conduct that made it reasonable to dismiss without investigation. Important that Tribunals resist employer attempts to apply the modified DDP to any case of gross misconduct.
40. Where either DDP applies, Tribunal time limit is extended by three months *provided* the employee has reasonable grounds for believing that
- a) the DDP, or
  - b) a disciplinary procedure negotiated between two or more employers or an employers' association and one or more independent trade unions, giving the employee an effective right of appeal against dismissal/disciplinary action short of dismissal, or
  - c) a workplace/contractual disciplinary procedure
- is ongoing. The Regulations encourage the use of workplace procedures.
41. The normal Tribunal time limit is *not* extended if the DDP is completed before that time limit expires, unless the employee has reasonable grounds for (mistakenly) believing (at expiry of that time limit) that it is still ongoing. Might a Tribunal might grant an extension of time using its normal discretion?
42. Unlike GP (below), there is no admissibility test where DDP applies, so ET1 will not be rejected if employee fails to wait 28 days during a DDP. But there could be a penalty in compensation if the employee fails to attend hearing, to appeal or otherwise to complete the DDP before lodging the ET1. So dangers for a premature Tribunal application.

## Grievance Procedure

43. GP applies to any grievance about an act or omission taken or contemplated by an employer in relation to an employee, that could form the basis of a Tribunal complaint.
44. GP never applies to a grievance about a direct dismissal, but will apply a constructive dismissals.
45. The modified GP applies where before the employment ended either
- the employer was unaware of the grievance or
  - the employer was aware but the GP was not started and completed before the last day of employment
- and in either case* the employer and employee agree in writing (after the employer becomes aware of the grievance) to apply the modified GP. Presumably this *disapplies* the standard GP where the employee did not raise the grievance before employment ended.
46. Where the employee could make a protected disclosure under the whistle blowing law, he/she has the choice whether to do so or whether to use the GP. Presumably if the employee opts for the GP, he/she must follow it through and will not be able to change horses in mid-stream.
47. Where either GP applies and the employee lodges an ET1 without both writing the Step One letter *and* waiting 28 days, the ROET will reject the application. [The DTI refers to this as the admissibility test.] However lodging the ET1 within the normal time limit triggers a three-month extension ***provided the employee then writes the Step One GP letter no later than one month after the expiry of the normal ET1 time limit.***
48. Where the employee writes the GP Step One letter within the normal ET1 time limit, there is an automatic three month extension of that time limit.
49. The same time limit provisions apply where:
- the employee gives the employer a statement saying that the relevant disciplinary action (short of dismissal) was discriminatory or not on grounds of his/her conduct or capability
  - a union official or employee representative raises a collective grievance in the appropriate manner
  - the employee raises the grievance under an alternative, collectively agreed grievance procedure.
50. A discrimination questionnaire *cannot* double up as a Step One grievance letter. IDS suggest that questionnaire can *include* a statement of grievance. The time limits for serving a questionnaire (before the ET1 goes in) are extended to coincide with an extension to ET1 time limit.
51. The Regulations say the employee "must set out *the* grievance in writing". Unclear whether an equal pay ET1 will have to identify (only) the same individual or class(es) of comparators as were named in the grievance.

## Grievances arising from disciplinary action

52. The GP does not apply to any grievance arising out of a direct dismissal (as distinct from a constructive dismissal).

53. Where the grievance arises from disciplinary action *short of dismissal*, the employee should normally use the DDP (in particular its appeal process) to raise a grievance.

54. An employer will not have to follow the DDP to take non-RDA action short of dismissal i.e. they contemplate no more than a warning or they do *not* claim the action is based on the employee's conduct or capability. In this event, the employee must use the GP to raise a grievance.

55. Where the employer is taking RDA (more than a warning or suspension on full pay, based on the employee's conduct or capability) the DDP not the GP will apply. However if *one of* the reasons for the grievance is that the RDA involves unlawful discrimination or is in truth *not* based on the employee's conduct or capability, the GP (standard or modified) will apply. Here the employee has the option of short-cutting the GP by sending a written statement to the employer setting out the grievance

a) where the employer is following the DDP, before the DDP appeal meeting

b) where the employer is not following the DDP, before lodging the ET1,

in which event he/she is deemed to have complied with the rest of the GP. If the employee leaves it too late to write this statement of grievance, he/she must follow the full GP.

56. Note that the DDP still applies, so the employee has to use the DDP appeal process. So an employee who only learns at the DDP appeal hearing that RDA is discriminatory, must follow the DDP appeal process *and* initiate and complete the GP i.e. face up to four hearings/meetings. Since the GP applies, the Tribunal time limit will be extended as explained in paragraph 48 above.

## Situations where the procedures do not apply

57. Where neither DDP nor GP applies:

- a) admissibility test does not apply; *but*
- b) employee must meet **normal time limits** for lodging ET1.

### *Both DDP and GP*

58. Party **has not started** relevant procedure because

- a) has reasonable grounds to fear doing so would result in significant threat to self, 3<sup>rd</sup> person, or property
- b) has been subjected to harassment [conduct violating person's dignity or creating intimidating, hostile etc environment] **and** has reasonable grounds to fear triggering procedure would result in further harassment
- c) it is not practicable to do so e.g. long term illness, cessation of business or a party is out of the country for a prolonged time.

59. Complying with a procedure would mean disclosing information in breach of national security.

### *Grievance Procedure*

60. Employment has terminated, employee has not triggered standard or modified GP and since employment ended it has become not reasonably practicable to write the Step One letter.

### *Dismissal and Disciplinary Procedure*

61. Employer dismisses all employees of a given description or category with an offer from same, successor or associated employer to re-engage in same or suitable different job.

62. Collective redundancies consultation applies i.e. 20 or more redundancies within 90 days. So DDP will apply to 19 or fewer redundancies.

63. Industrial action dismissals *unless* the employer selectively dismisses those taking part in industrial action that was authorised by a union but not protected – see paragraphs 0000 below;

64. Employer's (whole?) business suddenly ceases to function due to unforeseen event making it impractical to employ *any* employees.

65. Employee could not work without contravening a statutory duty/restriction;

66. Employee covered by dismissal procedure designated by SoS under '96 Act. [No such procedure currently in force];

67. Modified DDP would apply but employee lodges ET1 *before* employer sends statement of reasons. This saves the employee being locked out of ET by employer delay in writing with grounds of alleged gross misconduct & right of appeal. The employee can lodge ET1 straight away.

## Situations of deemed compliance

68. In some cases, the parties are treated as having complied with part or all of the relevant procedure, so that the three-month extension to relevant ET1 time limits *is available*.

### *Both DDP and GP*

69. Party **has started** relevant procedure but does not proceed because
- a) has reasonable grounds to fear doing so would result in significant threat to self, 3<sup>rd</sup> person, or property
  - b) has been subjected to harassment [conduct violating person's dignity or creating intimidating, hostile etc environment] **and** has reasonable grounds to fear triggering procedure would result in further harassment
  - c) it is not practicable to do so e.g. long term illness, business ceases.

### *Grievances*

70. Employer is taking RDA that employee claims is discriminatory or not based on his/her conduct or capability. Employee must give the employer a written grievance before the DDP meeting or appeal or (where employer is not following the DDP) before lodging the ET1. If the employee waits until the appeal meeting has started before making the allegation, he/she must follow the full GP.

71. Employee has written Step One standard GP letter but since employment has ended it has become impracticable for either party to comply with first meeting or appeal stages. If first meeting has taken place, employer must notify employee of response to grievance;

72. Officer of recognised union (or if union not recognised, official employed by same employer) raised written grievance on behalf of two or more named employees. **There is compliance only for each employee named in writing; so dangers for union officer who fails to check that the applicant was named in the written grievance.** If union not recognised, officer or external official cannot submit the written grievance;

73. Employee raises grievance under applicable procedure agreed between independent trade union(s) and two or more employers or an employer's federation. Both sides treated as having complied with relevant GP.

### *Dismissal or disciplinary action*

74. Interim relief for trade union dismissal. Deemed compliance only with appeal stage, so employer must write Step One letter and if invited to meeting employee must attend;

75. Dismissal or RDA (short of dismissal) covered by procedure agreed between independent trade union(s) and two or more employers or an employer's federation, giving an effective external right of appeal. Compliance only with appeal stage and on condition that employee does appeal. So employer and employee must still follow Steps One and Two.

## Unfair dismissal law

76. Automatically unfair to dismiss without completing applicable DDP where employer wholly or mainly to blame.
77. However if employer completes DDP but fails to follow a (different) procedure (e.g. own procedures or ACAS Code), dismissal not unfair if employer shows they would have dismissed anyway and that apart from that failure the dismissal was otherwise fair.
78. Where neither DDP is applicable, employer can again argue that following own/ACAS procedures would have made no difference. So easier for employer to excuse failure to consult individuals when implementing collective redundancies.

## Compensation

79. Failure to follow complete an applicable DDP or GP triggers ET obligation to vary compensation by 10%-50% depending on who is to blame.
80. Where exceptional circumstances make it unjust or inequitable to vary by 10%-50%, ET can make no or a lesser variation.
81. This variation applies to unfair dismissal compensatory award.
82. There will be a minimum basic award of four weeks' pay in unfair dismissal cases where the dismissal is unfair because of the employer's failure to complete an applicable DDP.

## Written particulars

83. The 2002 Act repeals the small employer (<20) exemption from providing a note of disciplinary rules & procedures
84. Employers are given more flexibility in providing written particulars e.g. in a letter of offer or appointment before employment begins or a formal written contract
85. Where a Tribunal upholds a listed complaint and finds the employer failed to provide/update written particulars, it will order 2 or 4 weeks' pay (to statutory maximum, currently £270) unless exceptional circumstances make it unjust/inequitable to do so.

## Industrial action dismissals

86. There are three categories of industrial action dismissals:

- Dismissals when taking unofficial action i.e. action which a trade union has not authorised or endorsed. You cannot complain of unfair dismissal and the employer can dismiss *without* following the DDP.
- Dismissals when taking protected action i.e. action authorised or endorsed by a trade union but protected because the union complied with all aspects of ballot law. The amendments made by the 1999 Act allow employees to complain of unfair dismissal. The DTI regards that protection as superior to the DDP, which will *not apply*.
- Dismissals when taking action that is official but not protected i.e. action authorised or endorsed by a trade union that failed to comply with all aspects of ballot law. You cannot complain of unfair dismissal *unless* the employer selectively dismisses or dismisses everyone and offers selective re-engagement within three months. In those narrow circumstances, the DDP applies.