Employment

Deciphering the code

Chris Bryden & **Michael Salter**

examine the award of uplifts in employment tribunals

IN BRIEF

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The Employment Act 2002 (EA 2002) introduced the prospect of an uplift or reduction percentage to awards in relevant claims to encourage compliance with the relevant procedure. Although the disciplinary and grievance procedures contained within that Act have since been repealed, the principle still remains albeit now contained within section 207A of the Trade Union Labour Relations (Consolidation) Act 1992. The "new" code, introduced in 2009, empowers the tribunal to adjust a relevant award by up to 25% if there has been an unreasonable failure to comply with the appropriate procedure.

Challenging terms

A recent research paper: *Evaluation of the Acas code of Practice on Disciplinary and Grievance Procedures* (2011, Nilufer Rahim, Ashley Brown and Jenny Graham (NatCen)), based on in-depth interviews of 36 employers, employees and their representatives, noted that terms used within the code, such as "reasonable", were considered challenging to implement consistently and for this reason, "doubts were expressed about the accessibility of the code to groups such as smaller employers".

While the report generally reflected a positive view of the code it did note that there was dissatisfaction expressed about the principles-based nature of it. The report found that the code had influenced what appeared to be a reactive review of disciplinary and grievance policies by employers, who appeared to consider that employers were seeking to weaken the protection of employees under the code, due to the lack of legally required processes (as there had been under the statutory disciplinary and dismissal procedures). Some employers however felt that the code did not go far enough in protecting them against spurious claims.

Tribunal awards

The report did not investigate any assessment of the adjustment of awards by tribunals under the code. Since the introduction of any concept of an uplift there has been very little guidance from the appellate courts or tribunals as to just how a tribunal should go about considering thus. While it might be argued that this is because the assessment of percentage uplifts or reductions is necessarily fact sensitive and must therefore rest fully within the domain of the tribunal hearing the evidence of any particular case, it is notable that in other fields (for example, contributory fault) guidelines have been promulgated by the superior courts and tribunals. These guidelines, while not having the force of statute, have usually been adopted and followed.

Uplift

An uplift can be applied when there has been an unreasonable failure to follow the procedures set out in the code. This is likely to apply in many cases where the tribunal has found there to have been a procedurally unfair dismissal as it is likely to be rare that a tribunal finds an unreasonable procedure has been followed by the employer in not following the code when assessing liability but not when considering the impact of that failure. However, even if there is an unreasonable failure, the tribunal must then proceed to consider whether the awarding of an uplift is just and equitable in all the circumstances. It is here that the appellate tribunals have seemed reluctant to provide any particular guidance. This reluctance of the higher courts to provide a proscriptive set of criteria which the tribunal must follow is understandable; indeed to impose such criteria would run contrary to the very ethos that appears throughout unfair dismissal law: the tribunal must only assess what a reasonable employer could have done and not what it would have done. For example, HHJ McMullen in support of such proposition, has noted that there are an infinite number of factors to consider when assessing what is just and equitable (*Butler v GR Carr (Essex) Ltd* [2008] All ER (D) 238 (Feb)).

Underhill P was somewhat more proscriptive in *Lawless v Print Plus* [2010] All ER (D) 92 (Aug) (a case on the old statutory procedures but which is still highly relevant) when he indicated that, although the criteria to consider when determining what percentage uplift to apply are broadly based, they must be limited to those matters that relate in some way to the failure to follow the

procedures. Accordingly, a timely concession of liability after the presentation of an ET1 cannot be a relevant factor to consider, as this is not relevant to the procedural failure. The tribunal is not equivalent to a criminal court where a timely guilty plea reduces the severity of the sentence. Thus, the factors that a tribunal will consider must relate to the employment relationship and be related to the failure to follow the procedure themselves.

Thus, it is clear that while no restrictive criteria have been proscribed, guidance as to the bounds of the discretion to be applied does exist. From the case law it would appear clear that the level of compliance; whether the failure to comply was deliberate or inadvertent; and whether there were any mitigating factors for the non-compliance, are all factors that should be considered when exercising discretion, as should the size and economic resources of the employer.

Once an uplift is found to be warranted the question then turns to the level of that uplift. Under EA 2002 the uplift could be up to 50%, and unless there were exceptional circumstances not less than 10%. Under the Employment Act 2008 this has reduced to a maximum uplift (or reduction) of 25% with no minimum. Again, the employment appeal tribunal (EAT) has shown itself unwilling to interfere with tribunals' decisions on the quantum of an uplift, albeit it is clear that the EAT requires that reasons be given by tribunals in respect of the percentage awarded, and the EAT in *McKindless Group v McLaughlin* [2008] IRLR 678 (a case under EA 2002) held that an uplift of over 10% should only be exercised in reference to the facts of the case before the tribunal that make it just and equitable to increase the award further.

Relevance of culpability

Again, when considering when an uplift is likely to be made, case law provides some guidance. Culpability is clearly relevant; in *Metrobus v Cook* [2007] All ER (D) 60 (Mar) the "blatant" breach of the DDPs justified a 40% uplift. The EAT in *Metrobus* accepted the tribunal's view that the uplift regime was based on punitive than compensatory principles. As stated above the size of the undertaking is clearly also be relevant. In *Wardle v Crédit Agricole Corporate and Investment Bank* [2011] All ER (D) 101 (May), the EAT expressly reduced the size of the percentage uplift (again, made under EA 2002) owing to a sizeable award given to the successful claimant by the employment tribunal. The Court of Appeal upheld this approach, in accordance with the principles argued in *Abbey National v Chagger* [2009] All ER (D) 168 (Nov).

The code is still relatively new. The research paper, though based on a relatively small sample, makes interesting reading with regard to the views held, particularly by employers, of its effect. As more cases involving uplifts under the code, rather than EA 2002, reach the appellate courts, it will be interesting to see whether the "punitive" nature of the uplifts continues to be recognised, and whether there will be a move towards greater proscription of what is just and equitable. The authors consider that the appellate courts are likely not to interfere in the implementation by tribunals of uplifts in the exercise of their appropriate discretion, but there may be the need for one or two nudges to ensure that that discretion is being exercised properly. NLJ

Chris Bryden, 4 King's Bench Walk. Website: *www.4kbw.co.uk*
Michael Salter, Ely Place Chambers. Website: *www.elyplace.com*