

Editorial

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Over the summer, two divisions of the Employment Appeal Tribunal have issued scathing criticisms of the new procedural rules.

In *Richardson v U Mole Ltd* [2005] IRLR 668, Burton J described the admissibility regime as one of “injustice” and urged parliament to re-evaluate the rules. He held that tribunals are entitled to overlook such shortcomings by the device of reviewing a decision not to admit a claim, thereby circumventing one of the government’s aims of reducing the number of claims admitted into the tribunal system.

In *Sodexho v Gibbons* (EAT/0318/05), HHJ Peter Clark said: “The 2004 rules introduce what, on one view, may be thought to be a series of carefully crafted hurdles

designed to restrict access to employment tribunals and thus reduce the costs of administering the employment tribunal system to both claimants and respondents.” In a controversial passage, he sent a signal to tribunals telling them that they should not follow the new rules too literally if it leads to injustice: “The introduction of the overriding objective and the increased power of employment tribunal chairmen to make orders on their own initiative should be seen as valuable signposts to chairmen to exercise their independent judgment to ensure fairness between the parties. It is what, to return to an earlier theme, truly distinguishes between judicial and administrative decisions.”

This theme can be seen in connection with first instance decisions arising from s.32 of the Employment Act 2002. In my last column, I asked for readers to send in copies of decisions arising from issues under the new statutory dismissal and grievance procedures. The four decisions received are statistically insufficient to show any real trend, but they do suggest that tribunals are taking a relaxed view to what amounts to a ‘grievance’.

In *Stewart v Barnett’s Motor Group Ltd*, a solicitor sent a letter before action to the employer, setting out proposals for compensation and requesting a response within 14 days, failing which proceedings would be issued. After a constructive dismissal claim was lodged, the employer argued that the letter before action was not a grievance letter as its purpose was litigious and not for the purpose of securing non-contentious dialogue. Moreover, the letter gave a timescale of 14 days, not the 28 days allowed under the statutory standard grievance procedure. The Edinburgh employment tribunal dismissed the employer’s arguments and held that the letter before action was sufficient to invoke the statutory grievance procedure. There was nothing in the legislation that required a grievance letter to be non-confrontational in nature, and all the employee is required to do is set out a grievance, defined as a ‘complaint’, in writing. The letter before action set out the employee’s complaints, and the employee was entitled to rely on a letter written by a solicitor on his behalf. This case is being appealed to the EAT, and will be heard in Edinburgh on about 20 December 2005.

Also being appealed, on the identical issue of whether a letter before action can amount to a formal ‘grievance’, is the case of *Mark Warner Ltd v Aspland*. This case takes the additional point that the letter contained settlement proposals and therefore – while not marked as such – had ‘without prejudice’ status and could not be relied on by the employee except in relation to costs.

In *Shergold v Fieldway Medical Centre*, an employee wrote a resignation letter that set out general complaints about the practice manager at the GP surgery where she worked. The employer told her that if she wished to raise a formal grievance

she could do so, but she did not. She also did not say that she believed her letter of resignation had amounted to a grievance. Ms Shergold then claimed constructive dismissal arising out of two specific incidents, neither of which had been mentioned in her resignation letter. The Croydon tribunal held the resignation letter did not amount to a statutory grievance as the letter did not raise the allegations she wanted to rely on as part of her claim, and therefore the employer had not been given the opportunity to respond to the two allegations. Accordingly, her claim was dismissed.

By contrast, a tribunal in Manchester held in *Tudor v Lowburch Ltd* that a resignation letter which simply said, "It is with regret I now find myself in the unfortunate position of having to tender my resignation. I feel that I cannot work under the constant watchful eyes and not being trusted to undertake my job properly", followed by a letter stating that she was considering a claim to the employment tribunal and "await your response" was sufficient to amount to a statutory grievance. The tribunal said that the claimant's admission that she did not intend the letters to amount to a grievance was irrelevant.

Keep watching this space.

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