

## **DTI REVIEW OF DISPUTE RESOLUTION**

### **The Law Society's submission**

**October 2006**

#### **Introduction**

1. The Law Society regulates and represents solicitors in England and Wales. The following submission to the review has been prepared on behalf of its representation arm by the Society's Employment Law Committee. The Committee is made up of senior and specialist employment lawyers from across the country. Committee members provide advice and representation to employers and employees through practice in City and regional firms, government, industry, trade unions and Law Centres. Committee members' experience includes part-time chairmanship of employment tribunals. The diversity of the Committee's composition is intentional.
2. We welcome the opportunity to contribute to the review. We have had the benefit of meeting the review team on two separate occasions. We are grateful for the opportunity this has given us to learn how the review process is being conducted. The purpose of this written submission is to crystallise our views on the many topics that have been discussed in those meetings, and to make recommendations about what areas the review should cover.
3. This response expresses the views of the Committee, based on members' own experience and that of their work colleagues.
4. The Committee has conducted an e-survey of some 3,000 employment practitioners. A response rate of 9.67% was achieved. The findings have been

shared with the review team. The survey questions and an analysis of responses are **Annex A**.

5. The purpose of the survey was to test how far the views of the Committee were shared by practitioners. By and large, they were. On some issues opinion was divided, but on the most important issues, such as the operation of the statutory grievance procedures, respondents were strongly of the same view as the Committee.
6. The survey findings have been taken into account, but they have not been determinative of the Committee's position. We indicate where they supported our view or were equivocal. There is no instance of the survey results contradicting our view.

## **Summary of this submission**

7. We consider that the dispute resolution regime has three main components:
  - a) the requirement upon employers to utilise the statutory dismissal and disciplinary procedures;
  - b) the requirement upon employees to utilise the statutory grievance procedures; and
  - c) the Fixed Periods for Conciliation.
8. This submission addresses each in turn, suggesting what issues should be canvassed in the review. We then address issues not dealt with elsewhere.
9. The fundamental question is whether, taken as a whole, the dispute resolution regime has been effective against the criteria that were set for it by Government. It is worth recalling what those criteria were. The justification advanced by Government in *Routes to Resolution* and the accompanying Regulatory Impact Assessments, and during debates on the Bill during its passage through Parliament, was that the new regime would:

- a) prevent employment relationships breaking down;
- b) reduce the need for employees to have recourse to employment tribunals; and
- c) improve standards of dispute resolution in the workplace.

10. For reasons that are elaborated later in this submission, we consider that these objectives have not been met. This was also the view of our survey respondents. In reply to direct questions, they answered as follows:

- 78% do not believe the new procedures have improved standards of dispute resolution in the workplace (Q.1)
- 93% do not believe the new procedures have helped prevent employment relationships breaking down (Q. 2)
- 90% do not believe the new procedures have reduced the need for employees to have recourse to the tribunals (Q.3)
- 76% say that dispute resolution in the workplace has become more formal, not less (Q. 4)

## **Summary of recommendations**

### **Dismissal and disciplinary procedures**

Recommendation 1: The standard and modified dismissal and disciplinary procedures should remain.

Recommendation 2: In the case of dismissal by reason only of the expiry of a fixed-term contract, consideration should be given to modifying the DDP so as to permit the parties jointly to decide, as the end of the contract approaches but not before, to dispense with a face-to-face meeting.

Recommendation 3: Section 98A(2) of the Employment Rights Act 1996 should be clarified.

Recommendation 4: Automatically unfair dismissal should remain.

Recommendation 5: There should be statutory guidance on the discretionary uplifts and deductions.

### **Grievance procedures**

Recommendation 6: Section 32 should be repealed and the standard and modified grievance procedures abolished.

Recommendation 7: If section 32 remains, the grievance procedures should no longer apply to monetary claims such as unlawful deductions.

Recommendation 8: If section 32 remains, it should no longer apply to claims for equal pay.

Recommendation 9: If section 32 remains, the modified grievance procedure should apply automatically, or if one party requests it; the consent of both parties should not be required.

Recommendation 10: If section 32 is retained, clarification is required of the overlap between the statutory grievance procedures and the statutory dismissal and disciplinary procedures.

Recommendation 11: The disparity in treatment between claims for breach of contract and claims for unauthorised deductions from wages should be ended.

### **Fixed Periods of Conciliation**

Recommendation 12: The Fixed Periods for Conciliation should be abolished.

## **The statutory dismissal and disciplinary procedures**

**Recommendation 1:** The standard and modified dismissal and disciplinary procedures should remain.

11. We consider that the introduction of the dismissal and disciplinary procedures (DDP) has been a good thing even though, inevitably, the price for concentration on the minimum statutory requirements has been that less attention is paid to the Acas statutory Code. The focus of both employers and some tribunals appears to have shifted from good industrial relations practice to the bare legal minimum. It is striking that respondents to our survey made few specific criticisms of the DDP, whereas they expressed high levels of dissatisfaction with all aspects of the statutory grievance procedures.

12. The DDP has brought more formality into the disciplinary and dismissal processes of some employers who previously dealt with such matters in an informal and even arbitrary way. Whereas we see increased formality in relation to employee grievances as a problem (see below), we have fewer misgivings about the increased formality of the disciplinary and dismissal process.

13. We understand, moreover, that some employers' organisations believe they are making headway in educating their members about the need for proper disciplinary procedures. It would be unfortunate if that process were to be jeopardised by the removal of the DDP.

**Recommendation 2:** In the case of dismissal by reason only of the expiry of a fixed-term contract, consideration should be given to modifying the DDP so as to permit the parties jointly to decide, as the end of the contract approaches but not before, to dispense with a face-to-face meeting.

14. Because the statutory definition of 'dismissal' in section 95(1)(b) of the Employment Rights Act 1996 includes the non-renewal of a fixed-term contract, it is necessary for an employer to go through the formal DDP even when an employee acquiesces in the non-renewal. The justification is that having to go through the DDP may serve to draw to the attention of both employer and employee that there is indeed a dismissal, and the employee has the right to challenge it as unfair. It may encourage the employer to look at alternatives to dismissal, such as redeployment.

15. In some cases the employee acquiesces in the non-renewal and does not seek redeployment. Nevertheless, the procedure must be followed. We think this is unnecessary and time consuming.

**Recommendation 3:** Section 98A(2) of the Employment Rights Act 1996 should be clarified.

16. Our survey contained a direct question "Do you think that the provisions of section 98A(2) (concerning the pre-*Polkey* approach to procedural fairness) are clear?". In reply, 78% per cent of respondents answered 'no'.

**Recommendation 4:** Automatically unfair dismissal should remain.

17. We consider that the sanction of automatically unfair dismissal is essential to the effectiveness of the DDP.

**Recommendation 5:** There should be statutory guidance on the discretionary uplifts and deductions.

18. In reply to a direct question, 69% of respondents to our survey requested statutory guidance. More than half our respondents say that discretionary uplifts and deductions are not being applied consistently as between tribunals.

## **The statutory grievance procedures and section 32**

**Recommendation 6:** Section 32 should be repealed and the standard and modified grievance procedures abolished.

19. We asked a number of questions about grievance procedures in our survey, but did not ask directly whether section 32 should be abolished. However, many respondents referred to section 32 in their general comments and recommendations for reform. We are in no doubt about our recommendation.

20. The case for repealing section 32:

- a) It is ineffective in resolving disputes;
- b) It has been at best a mixed blessing for employers; and
- c) It is unfair to claimants and operates as a bar on access to justice.

21. No aspect of the dispute resolution regime is causing more concern than the statutory grievance procedures and section 32. The problems are complex, but at heart, the difficulty is this: the dispute resolution regime as a whole, and section 32 in particular, has led to more formality, not less, in workplace dispute resolution.

22. Committee members are aware that employers benefit from being afforded the opportunity to deal with an employee's grievance before a tribunal case is started. However, there is a marked tendency on the part of employers to bring in lawyers, at an earlier stage than before, to advise on individual grievances. In the past they were unlikely to consult a solicitor until they received an ET1. Now, section 32 has created a link between the tribunal case and the earlier grievance. Employers know that a grievance may herald an application to the tribunal, in which the employee will seize upon any procedural failing on the employer's part. Employers are in defensive mode.

23. This has been detrimental to standards of dispute resolution. Respondents to our survey speak of the parties using the grievance hearing as a “dummy run”. Our respondents speak from first-hand experience; many say their practice has expanded as a direct result of these provisions, and they regularly advise on grievances.
24. Many employers fail to recognise a grievance. Almost all our respondents had encountered this. 97% say employers fail to recognise that an issue amounts to a statutory grievance either occasionally (24%) or often (73%). A number of our respondents made the point that the EAT’s liberal interpretation of what is a grievance has created “a trap for unwary employers”. That should be neither the purpose nor the effect of the law.
25. It does not surprise us at all that section 32 has failed to improve standards of dispute resolution in the workplace. We believe that once an employee has made the decision to go to the tribunal, it is by and large impossible for the parties to resolve the dispute between themselves without assistance from a third party such as an Acas conciliator or a mediator.
26. The statutory bar imposed by section 32 poses urgent questions about access to justice. The Tribunal Service’s figures show that large numbers of claims are being rejected and are not being re-presented. We do not wish to pre-judge the results of the ongoing research into rejected claims, but it would be quite wrong to disregard such a clear warning sign. The bar to access to the tribunals must bear especially heavily on unrepresented claimants, among whom will be disproportionate numbers of workers for whom English is not the first language and those who have difficulty obtaining legal advice because of disability or adverse personal circumstances.
27. We believe the bar on access is entirely unacceptable and section 32 should be repealed.
28. Before reaching our conclusion, we considered with great care whether the effects of section 32 might instead be mitigated in some way. In particular we considered whether there ought to be some formal requirement for a statutory grievance – effectively overturning the case law. If this was not to be gravely prejudicial to employees, it would need to be part of a very different regime that

might work on the following lines: the ET1 would be registered but stayed, and the employee given a grievance form to complete and take to his employer.

29. Merely to make this suggestion is to demonstrate how futile it would be. The policy aim is to reduce the work of the tribunals, not to increase it. The employer might just as well be served with the ET1, and offered the services of Acas. We have remarked above that it is Acas involvement that will resolve disputes that have reached this stage, not paper procedures.
30. The review will need to consider whether something might be put in place of section 32. We have asked ourselves whether the tribunal might be required to enquire into attempts to resolve the dispute so as to determine whether the parties had negotiated in good faith, and the existing provisions concerning modification of the award amended so as to give the tribunal complete discretion to increase or reduce the award where it found that one party had not done so.
31. There are many objections to this. It would apply only to successful claims; it would be grossly unfair to claimants who were ignorant of the statutory provisions; it would open a can of worms, adding to the length of hearings; and it might militate against negotiation in good faith if without prejudice negotiations risked being opened to scrutiny.
32. We consider that there is one way that the removal of section 32 can be mitigated. It does not strictly speaking fall within the ambit of dispute resolution, but might in our view be helpful in those cases where the employee is entirely ignorant that the employer has a grievance procedure. The section 1 statement of employment particulars must include a note relating to the manner of redress of an employee's grievance. Employers should be encouraged to make their employees aware of their grievance procedures in this way. We therefore propose that the penalties for failing to provide a section 1 statement of employment particulars should be increased and there should be a publicity campaign to remind employers of their obligation in this regard.
33. We turn now to a number of serious problems that must be addressed if section 32 remains in place.

**Recommendation 7:** If section 32 remains, the grievance procedures should no longer apply to monetary claims such as unlawful deductions.

34. On this issue our respondents were of two views, but we consider the position to be straightforward. A claim for a liquidated sum is a debt. It is wrong in principle, and pointless in practice, to require the parties to engage in dispute resolution over a debt. An employer who acknowledges liability can pay, and in an open and shut case Acas can give guidance and steer the employer towards doing so. If liability is in dispute, the case should be listed for hearing without delay. To give an example that arises often in practice: on dismissal, an employee may have wages and holiday pay withheld as a punitive measure by an employer who has no regard for proper procedures and is willing to take advantage of the fact that the employee lacks employment protection and has no redress for a summary dismissal. Such an employee is very vulnerable, and should be entitled to an immediate hearing.

**Recommendation 8:** If section 32 remains, it should no longer apply to claims for equal pay.

35. Equal pay claims are extremely complex and the majority are presented as multiple claims. The requirement for a statutory grievance is a bureaucratic nightmare for claimants' representatives.

**Recommendation 9:** If section 32 remains, the modified grievance procedure should apply automatically, or if one party requests it; the consent of both parties should not be required.

36. Solicitors regularly advise employers not to agree to use the modified grievance procedure, because refusal may well cause the employee to drop the case, or give rise to the reductions, pursuant to section 31, in any subsequent tribunal award. This gives a tactical advantage to the employer which many solicitors consider extremely unfair.

**Recommendation 10:** If section 32 is retained, clarification is required of the overlap between the statutory grievance procedures and the statutory dismissal and disciplinary procedures.

37. Nowhere does the inherent complexity of the regulations show itself more clearly. Our survey asked whether, when an employee raises a grievance during a disciplinary or dismissal procedure, there is ever confusion about what procedure should be applied to the grievance. 73% of respondents answered yes, and confusion between the two procedures is a major theme in the narrative sections.

**Recommendation 11:** The disparity in treatment between claims for breach of contract and claims for unauthorised deductions from wages should be ended.

38. Breach of contract claims are listed in Schedule 3 of the 2002 Act but not in Schedule 4. Because Schedule 4 does not apply section 32 to these claims, there is no bar to the employee presenting a claim without first taking out a grievance; but the inclusion of breach of contract claims in Schedule 3 means that if a grievance has not been raised, the employee's award is liable to be reduced by up to 50%. This inconsistency should be resolved. Our survey respondents were equally divided over which way the change should go. Whatever solution is adopted, we favour consistency of treatment between claims for breach of contract and claims for unauthorised deductions.

39. The treatment of claims arising from requests for flexible working likewise requires attention, as section 32 does not apply to them but section 31 does. There may be other instances of this anomaly.

## **Fixed Periods for Conciliation**

**Recommendation 12:** The Fixed Periods for Conciliation should be abolished.

40. In *Routes to Resolution* it was suggested that "A clearly defined period for conciliation within the process for resolving disputes should help increase the number of timely settlements through conciliation" and that "A clear period for conciliation with limited scope for extension might focus the parties' minds within that period on whether they were interested in reaching an amicable settlement or not". (*Routes to Resolution* paragraphs 4.8 and 4.9).

41. The best that can be said of this is that it is assertion not based on evidence, the product of wishful thinking. To practitioners it is utterly counter-intuitive. We

correctly predicted that our respondents would pronounce Fixed Periods for Conciliation a miserable failure, but we were unprepared for the strength of feeling on this topic displayed in the narrative responses. It was referred to again and again. 81% of our survey respondents want to do away with Fixed Periods for Conciliation. We agree.

## **Other issues**

### **Section 30**

42. We do not recommend that implementation of section 30 should be raised as an issue in the review. Among the likely consequence of implementation would be the following: acts by the employer that were not in themselves actionable, such as discrimination on grounds not prohibited by law, and that might be quite trivial, would become the subject of litigation; where failure by the employer to follow a statutory procedure amounted to a fundamental breach, the employee might succeed in a claim constructive dismissal, in which case terms such as restrictive covenants would not be enforceable against him; and an employee might issue proceedings in the civil courts to obtain an injunction to prevent a breach of procedure or an award of damages if a breach had occurred.
  
43. Furthermore, it is unclear what would be the appropriate forum for claims under section 30. At present, the employment tribunals' jurisdiction in cases of breach of contract is confined to claims under £25,000 where the employment has ended. Would claims under section 30 be assigned to the county courts?



# Dispute Resolution survey

268 responses

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### 1 Do you think the dispute resolution procedures have improved standards of dispute resolution in the workplace?

Answer	Value	Count	%
no	no	201	78 %
yes	yes	51	20 %
no opinion	noopinion	6	2 %

### 2 Do you think the dispute resolution procedures have helped prevent employment relationships breaking down?

Answer	Value	Count	%
no	no	239	93 %
yes	yes	12	5 %
no opinion	noopinion	6	2 %

### 3 Do you think the dispute resolution procedures have reduced the need for employees to have recourse to employment tribunals?

Answer	Value	Count	%
no	no	232	90 %
yes	yes	20	8 %
no opinion	noopinion	6	2 %

### 4 Since October 2004, has dispute resolution in the workplace been ...

Answer	Value	Count	%
more formal	Moreformal	197	76 %
about the same	aboutthesame	49	19 %
more informal	moreinformal	6	2 %
no opinion	noopinion	6	2 %

**5 Do you think the dispute resolution procedures have unfairly disadvantaged claimants?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	143	55 %
yes	yes	105	40 %
no opinion	noopinion	13	5 %

**6 Do you think the dispute resolution procedures have unfairly disadvantaged employers?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
yes	yes	152	58 %
no	no	97	37 %
no opinion	noopinion	12	5 %

**8 Notwithstanding any concerns you may have, do you think that on the whole the dispute resolution régime is an improvement on what went before?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	179	69 %
yes	yes	70	27 %
no opinion	noopinion	12	5 %

**9 Are you answering as an individual, or on behalf of a firm or organisation?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
individual	individual	171	66 %
firm or organisation	firm	88	34 %

**10 Do you / your firm act for claimants, respondents or both?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
both	both	151	59 %
respondents	respondents	72	28 %
claimants	claimants	34	13 %

**12 Would you like to continue with part 2? It should take less than 10 minutes.**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
yes, please continue with the questionnaire	yes	176	68 %
no, please let me submit my answers now	no	82	32 %

**13 How easy is it for a lay person to understand the requirements of the dispute resolution regulations?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
very difficult	vdifficult	83	46 %
quite difficult	difficult	73	41 %
quite easy	easy	20	11 %
no opinion	noopinion	4	2 %
very easy	veryeasy	0	0 %

**14 Do employers ever fail to recognise that an issue raised by an employee amounts to a statutory grievance?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
often	Often	127	71 %
occasionally	occasionally	47	26 %
rarely	rarely	4	2 %
no opinion	noopinion	2	1 %
never	never	0	0 %

**15 When an employee raises a grievance during a disciplinary or dismissal procedure, is there ever confusion about what procedure should be applied to the grievance?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
often	Often	132	73 %
occasionally	occasionally	43	24 %
no opinion	noopinion	3	2 %
rarely	rarely	2	1 %
never	never	0	0 %

**16 Has the complexity of the statutory grievance procedures deterred employees from taking unresolved complaints to employment tribunals?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	74	41 %
yes	yes	67	37 %
no opinion	noopinion	39	22 %

**17 Does it happen that an employee whose claim is rejected under rule 3(2)(c) attempts to rectify the problem but fails to do so and is unable to proceed with the claim?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no opinion	noopinion	70	39 %
occasionally	occasionally	66	37 %
rarely	rarely	22	12 %
often	Often	14	8 %
never	never	7	4 %

**18 Should the grievance procedures continue to apply to monetary claims such as unlawful deductions?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	85	47 %
yes	yes	83	46 %
no opinion	noopinion	12	7 %

**19 Should the grievance procedures continue to apply to non-monetary claims such as unlawful discrimination and trade union victimisation?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
yes	yes	101	56 %
no	no	69	38 %
no opinion	noopinion	10	6 %

**20 Should there continue to be a modified grievance procedure?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
yes	yes	125	69 %
no	no	46	26 %
no opinion	noopinion	9	5 %

**21 Should the requirement for both parties to agree to the use of the modified grievance procedure be retained?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	106	59 %
yes	yes	61	34 %
no opinion	noopinion	13	7 %

**22 Where a claim is rejected under rule 3(2)(c), the employer is not told the claim was presented. Do you think the employer should be told?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
yes	yes	107	59 %
no	no	52	29 %
no opinion	noopinion	21	12 %

**23 How often do problems arise where a claimant makes several claims in one claim form, and some claims are accepted while others are rejected?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
occasionally	occasionally	70	39 %
often	Often	59	33 %
no opinion	noopinion	30	17 %
rarely	rarely	18	10 %
never	never	3	2 %

**24 Are the rules on admissibility of claims being applied consistently from tribunal to tribunal?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	84	47 %
no opinion	noopinion	79	44 %
yes	yes	17	9 %

**25 Should there continue to be fixed periods for conciliation?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	145	81 %
yes	yes	30	17 %
no opinion	noopinion	5	3 %

**26 Do you think that the provisions of section 98A(2) (concerning the pre-Polkey approach to procedural fairness) are clear?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no	no	139	78 %
yes	yes	23	13 %
no opinion	noopinion	17	9 %

**27 Should statutory examples be provided of the circumstances in which a discretionary uplift or reduction in compensation of between 10% and 50% ought to be awarded?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
yes	yes	125	69 %
No	no	44	24 %
no opinion	noopinion	11	6 %

**28 Are discretionary uplifts and reductions of compensation being awarded consistently from tribunal to tribunal?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
no opinion	noopinion	109	60 %
no	no	67	37 %
yes	yes	5	3 %

**29 Claims for breach of contract are not included in Schedule 4 of the Act, so an employee can bring a claim for breach of contract without first raising a grievance; but if the claim is successful, the tribunal is obliged under section 31(2) to make a 10% deduction from the award. What should be done about this?**

<b>Answer</b>	<b>Value</b>	<b>Count</b>	<b>%</b>
include in Schedule 4	includeschedule4	78	43 %
disapply section 31(1)	disapply	77	43 %
no opinion	noopinion	18	10 %
no change	nochange	8	4 %