Draft Regulations laid before Parliament under section 51 of the Employment Act 2002, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2004 No.

EMPLOYMENT TRIBUNALS
TERMS AND CONDITIONS OF EMPLOYMENT

The Employment Act 2002 (Dispute Resolution) Regulations 2004

Made - - - -	*2004*
Coming into force - -	*1st October 2004*

Whereas a draft of these Regulations was laid before Parliament in accordance with section 51(4) of the Employment Act 2002(**1**) and approved by a resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred on her by sections 31(6), 32(7), 33 and 51(1)(a) and (b) of that Act, hereby makes the following Regulations:

Citation and Commencement

1. These Regulations may be cited as the Employment Act 2002 (Dispute Resolution) Regulations 2004 and shall come into force on 1st October 2004.

Interpretation

2.—(1) In these Regulations—

"the 1992 Act" means the Trade Union and Labour Relations (Consolidation) Act 1992(**2**);

"the 1996 Act" means the Employment Rights Act 1996(**3**);

"the 1999 Act" means the Employment Relations Act 1999(**4**);

"the 2002 Act" means the Employment Act 2002;

"action" means any act or omission;

"applicable statutory procedure" means the statutory procedure that applies in relation to a particular case by virtue of these Regulations;

(**1**) 2002 c. 22.
(**2**) 1992 c. 52.
(**3**) 1996 c. 18.
(**4**) 1999 c. 26.

"collective agreement" has the meaning given to it by section 178(1) of the 1992 Act;

"dismissal and disciplinary procedures" means the statutory procedures set out in Part 1 of Schedule 2;

"dismissed" has the meaning given to it in section 95(1)(a) and (b) of the 1996 Act;

"employers' association" has the meaning given to it by section 122 of the 1992 Act;

"grievance" means a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him;

"grievance procedures" means the statutory procedures set out in Part 2 of Schedule 2;

"independent trade union" has the meaning given to it by section 5 of the 1992 Act;

"modified dismissal procedure" means the procedure set out in Chapter 2 of Part 1 of Schedule 2;

"modified grievance procedure" means the procedure set out in Chapter 2 of Part 2 of Schedule 2;

"non-completion" of a statutory procedure includes non-commencement of such a procedure except where the term is used in relation to the non-completion of an identified requirement of a procedure or to circumstances where a procedure has already been commenced;

"party" means the employer or the employee;

"relevant disciplinary action" means action, short of dismissal, which the employer asserts to be based wholly or mainly on the employee's conduct or capability, other than suspension on full pay or the issuing of warnings (whether oral or written);

"standard dismissal and disciplinary procedure" means the procedure set out in Chapter 1 of Part 1 of Schedule 2;

"standard grievance procedure" means the procedure set out in Chapter 1 of Part 2 of Schedule 2;

and a reference to a Schedule is a reference to a Schedule to the 2002 Act.

(2) In determining whether a meeting or written communication fulfils a requirement of Schedule 2, it is irrelevant whether the meeting or communication deals with any other matter (including a different matter required to be dealt with in a meeting or communication intended to fulfil a requirement of Schedule 2).

Application of dismissal and disciplinary procedures

3.—(1) Subject to paragraph (2) and regulation 4, the standard dismissal and disciplinary procedure applies when an employer contemplates dismissing or taking relevant disciplinary action against an employee.

(2) Subject to regulation 4, the modified dismissal procedure applies in relation to a dismissal where—

(a) the employer dismissed the employee by reason of his conduct without notice,

(b) the dismissal occurred at the time the employer became aware of the conduct or immediately thereafter,

(c) the employer was entitled, in the circumstances, to dismiss the employee by reason of his conduct without notice or any payment in lieu of notice, and

(d) it was reasonable for the employer, in the circumstances, to dismiss the employee before enquiring into the circumstances in which the conduct took place,

but neither of the dismissal and disciplinary procedures applies in relation to such a dismissal where the employee presents a complaint relating to the dismissal to an employment tribunal at a time when the employer has not complied with paragraph 4 of Schedule 2.

Dismissals to which the dismissal and disciplinary procedures do not apply

4.—(1) Neither of the dismissal and disciplinary procedures applies in relation to the dismissal of an employee where—

(a) all the employees of a description or in a category to which the employee belongs are dismissed, provided that the employer offers to re-engage all the employees so dismissed either before or upon the termination of their contracts;

(b) the dismissal is one of a number of dismissals in respect of which the duty in section 188 of the 1992 Act (duty of employer to consult representatives when proposing to dismiss as redundant a certain number of employees) applies;

(c) at the time of the employee's dismissal he is taking part in—

(i) an unofficial strike or other unofficial industrial action, or

(ii) a strike or other industrial action (being neither unofficial industrial action nor protected industrial action), unless the circumstances of the dismissal are such that, by virtue of section 238(2) of the 1992 Act, an employment tribunal is entitled to determine whether the dismissal was fair or unfair;

(d) the reason (or, if more than one, the principal reason) for the dismissal is that the employee took protected industrial action and the dismissal would be regarded, by virtue of section 238A(2) of the 1992 Act, as unfair for the purposes of Part 10 of the 1996 Act;

(e) the employer's business suddenly ceases to function, because of an event unforeseen by the employer, with the result that it is impractical for him to employ any employees;

(f) the reason (or, if more than one principal reason) for the dismissal is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment; or

(g) the employee is one to whom a dismissal procedures agreement designated by an order under section 110 of the 1996 Act applies at the date of dismissal.

(2) For the purposes of paragraph (1)—

"unofficial" shall be construed in accordance with subsections (2) to (4) of section 237 of the 1992 Act;

"strike" has the meaning given to it by section 246 of the 1992 Act;

"protected industrial action" shall be construed in accordance with section 238A(1) of the 1992 Act;

and an employer shall be regarded as offering to re-engage an employee if that employer, a successor of that employer or an associated employer of that employer offers to re-engage the employee, either in the job which he held immediately before the date of dismissal or in a different job which would be suitable in his case.

Circumstances in which parties are treated as complying with the dismissal and disciplinary procedures

5.—(1) Where—

(a) either of the dismissal and disciplinary procedures is the applicable statutory procedure in relation to a dismissal,

(b) the employee presents an application for interim relief to an employment tribunal pursuant to section 128 of the 1996 Act (interim relief pending determination of complaint) in relation to his dismissal, and

(c) at the time the application is presented, the requirements of paragraphs 1 and 2 or, as the case may be, paragraph 4 of Schedule 2 have been complied with but the requirements of paragraph 3 or 5 of Schedule 2 have not,

the parties shall be treated as having complied with the requirements of paragraph 3 or 5 of Schedule 2.

(2) Where either of the dismissal and disciplinary procedures is the applicable statutory procedure in relation to the dismissal of an employee or to relevant disciplinary action taken against an employee but—

(a) at the time of the dismissal or the taking of the action an appropriate procedure exists,

(b) the employee is entitled to appeal under that procedure against his dismissal or the relevant disciplinary action taken against him instead of appealing to his employer, and

(c) the employee has appealed under that procedure,

the parties shall be treated as having complied with the requirements of paragraph 3 or 5 of Schedule 2.

(3) For the purposes of paragraph (2) a procedure is appropriate if it—

(a) gives the employee an effective right of appeal against dismissal or disciplinary action taken against him, and

(b) operates by virtue of a collective agreement made between two or more employers or an employers' association and one or more independent trade unions.

Application of the grievance procedures

6.—(1) The grievance procedures apply, in accordance with the paragraphs (2) to (7) of this regulation, in relation to any grievance about action by the employer that could form the basis of a complaint by an employee to an employment tribunal under a jurisdiction listed in Schedule 3 or 4, or could do so if the action took place.

(2) Subject to paragraphs (3) to (7), the standard grievance procedure applies in relation to any such grievance.

(3) Subject to paragraphs (4) to (7), the modified grievance procedure applies in relation to a grievance where—

(a) the employee has ceased to be employed by the employer;

(b) the employer—

(i) was unaware of the grievance before the employment ceased, or

(ii) was so aware but the standard grievance procedure was not commenced or was not completed before the last day of the employee's employment; and

(c) the parties have agreed in writing in relation to the grievance, whether before, on or after that day, but after the employer became aware of the grievance, that the modified procedure should apply.

(4) Neither of the grievance procedures applies where—

(a) the employee has ceased to be employed by the employer;

(b) neither procedure has been commenced; and

(c) since the employee ceased to be employed it has ceased to be reasonably practicable for him to comply with paragraph 6 or 9 of Schedule 2.

(5) Neither of the grievance procedures applies where the grievance is that the employer has dismissed or is contemplating dismissing the employee.

(6) Neither of the grievance procedures applies where the grievance is that the employer has taken or is contemplating taking relevant disciplinary action against the employee unless one of the reasons for the grievance is a reason mentioned in regulation 7(1).

(7) Neither of the grievance procedures applies where regulation 11(1) applies.

Circumstances in which parties are treated as complying with the grievance procedures

7.—(1) Where the grievance is that the employer has taken or is contemplating taking relevant disciplinary action against the employee and one of the reasons for the grievance is—

(a) that the relevant disciplinary action amounted to or, if it took place, would amount to unlawful discrimination, or

(b) that the grounds on which the employer took the action or is contemplating taking it were or are unrelated to the grounds on which he asserted that he took the action or is asserting that he is contemplating taking it,

the standard grievance procedure or, as the case may be, modified grievance procedure shall apply but the parties shall be treated as having complied with the applicable procedure if the employee complies with the requirement in paragraph (2).

(2) The requirement is that the employee must set out the grievance in a written statement and send the statement or a copy of it to the employer—

(a) where either of the dismissal and disciplinary procedures is being followed, before the meeting referred to in paragraph 3 or 5 (appeals under the dismissal and disciplinary procedures) of Schedule 2, or

(b) where neither of those procedures is being followed, before presenting any complaint arising out of the grievance to an employment tribunal.

(3) In paragraph (1)(a) "unlawful discrimination" means an act or omission in respect of which a right of complaint lies to an employment tribunal under any of the following tribunal jurisdictions (specified in Schedules 3 and 4)—

section 2 of the Equal Pay Act 1970(**5**);

section 63 of the Sex Discrimination Act 1975(**6**);

section 54 of the Race Relations Act 1976(**7**);

section 17A of the Disability Discrimination Act 1995(**8**);

regulation 28 of the Employment Equality (Religion or Belief) Regulations 2003(**9**);

regulation 28 of the Employment Equality (Sexual Orientation) Regulations 2003(**10**).

8.—(1) Where—

(a) the standard grievance procedure is the applicable statutory procedure,

(b) the employee has ceased to be employed by the employer,

(**5**) 1970 c. 41.
(**6**) 1975 c. 65.
(**7**) 1976 c. 74.
(**8**) 1995 c. 50. Section 17A was inserted by S.I.2003/1673, regulations 3(1) and 9(1); the new section replaced section 8 of the 1995 Act and contained amendments.
(**9**) S.I. 2003/1660.
(**10**) S.I. 2003/1661.