

Transition Arrangements

The old system will not disappear overnight – it will continue to apply to disputes where the ‘trigger event’ occurs before the cut-off dates set out in The Employment Act 2008 (Commencement No.1, Transitional Provisions and Savings) Order 2008 SI 2008/3232. Where they do still apply, the associated three month extension for bringing a tribunal claim, the old compensation adjustments and the automatic unfair dismissal provisions will also apply.

Determining which regime applies

The different consequences and time limits that flow from failing to follow either the old or the new regime means that it is vital to know which one applies. This will depend on establishing when the trigger event has occurred. The parties to a dispute cannot agree to the case being dealt with under one regime or the other. The regime that applies is determined by the transitional provisions in the Order.

Where the trigger event occurs before 6 April, the existing procedures continue to apply. Where it occurs on or after 6 April, they do not. There are different trigger events depending on whether a grievance or a disciplinary situation arises.

Cut-off dates – grievances

The trigger for a grievance procedure will be the date of the action about which the employee complains.

If the action occurred wholly before 6 April 2009, the 2004 Grievance Procedures continue to apply. However, they also apply if the action complained of began on or before 5 April 2009 and *continues* beyond that date and the employee has submitted a written grievance or an employment tribunal claim:-

on or before 4 July 2009 if it relates to a jurisdiction with a three-month time limit (as it is in most cases; for example, unfair dismissal and discrimination claims) or

on or before 4 October 2009 if it relates to a jurisdiction with a six-month time limit (namely, equal pay or redundancy payments claims, and claims for dismissals taken in connection with industrial action (S.238 of the Trade Union and Labour Relations (Consolidation) Act 1992).

NB : It is not clear why dismissals are included in the Order. This means that some claims to which the existing grievance procedures apply may not be heard by a tribunal until 2010. Cases that require ongoing case management discussions, which are not uncommon in, for example, the equal pay arena, or those that end up appealed, may even run into 2011.

Cut-off dates – disciplinary and dismissal cases

The trigger date for determining which regime applies to disciplinary action or dismissal will be the date when the employer has started the disciplinary or dismissal action. This will usually be the date that a Step 1 letter was sent to the employee or the date of the Step 2 meeting. If neither step has been taken, it will be the date of the disciplinary action or dismissal.

The existing Disciplinary Procedure will therefore apply if on or before 5 April 2009 the employer has:

- sent the employee a Step 1 statement or held a Step 2 disciplinary or dismissal meeting, or
- taken relevant disciplinary action against the employee; or
- dismissed the employee.

Under the standard procedure, the Step 1 statement must set out in writing the employee’s alleged conduct, characteristics or circumstances which led the employer to contemplate dismissing or taking disciplinary

action against the employee. Where the modified procedure is used, the employer must set out in writing the employee's alleged misconduct which has led to the dismissal and the basis for believing at the time of the dismissal that the employee was guilty of the alleged misconduct.

BERR examples

The following examples taken from the guidance issued by the Department of Business, Enterprise and Regulatory Reform (BERR) on the application of the transitional provisions show how they will work in practice.

Dismissals (involving disciplinary/dismissal procedures)

A is issued with a Step 1 letter on 15 March 2009 and is dismissed on 5 April 2009. On 4 July 2009 she has reasonable grounds for believing that the dismissal procedure is being followed and receives a three-month extension until 4 October. Although the case is not heard at an employment tribunal until December 2009, the old regime (the DDPs) applies as the employer had taken a step under the DDP on or before 5 April 2009.

B is dismissed on 6 April 2009 but his employer had issued a Step 1 letter in March 2009. He makes an unfair dismissal claim on 6 May 2009. The old regime applies as his employer had taken a step under the 2004 Disciplinary Procedure on or before 5 April 2009.

C is dismissed on 6 May 2009 following a Step 1 letter on 6 April 2009. She makes a claim for unfair dismissal on 4 July 2009. The new regime applies as her employer took action on or after 6 April 2009.

Employer takes action which forms the basis of a grievance in jurisdictions with a three month time limit

The employer takes action on 10 January 2009 which continues beyond 6 April 2009. D submits a written grievance on 7 April 2009 and issues a tribunal claim which is heard in December 2009. The old regime applies as the action began on or before 5 April 2009 and continues, and the grievance was put in before 4 July.

The employer takes action on 10 January 2009 which stops on 10 February 2009. E submits a written grievance on 11 February 2009 and makes a tribunal claim on 7 April 2009. The old regime still applies as the action took place before 6 April 2009.

The employer takes action on 10 January 2009 which continues until 9 January 2010. F submits a written grievance on 10 January 2010 and makes a tribunal claim. The new regime applies as, although F may have had grounds for a grievance before 6 April 2009, she submitted the written grievance (or the tribunal claim) after 4 July 2009.

The employer takes action on 5 April 2009 which continues until 5 May 2009. G submits a written grievance on 5 July 2009 followed by a tribunal claim on 4 October 2009, which is heard in January 2010. The new regime applies as G submitted the grievance (or tribunal claim) after 4 July 2009.

The employer takes action on 6 April 2009 which continues until 5 November 2009. H submits a written grievance on 6 November 2009, makes a tribunal claim on 4 May 2010, and the case is heard during 2010. The new regime applies as the employer's action took place on or after 6 April 2009.

Employer takes action which forms the basis of a grievance in jurisdictions with a six month time limit

The employer takes action on 10 January 2009 which continues beyond 6 April 2009. I submits a written grievance on 7 April 2009. The tribunal claim is heard in December 2009. The old regime applies as the act began before 6 April 2009 but continues, and the grievance is put in on or before 4 October.

The employer takes action on 10 January 2009 which continues until 9 January 2010. J submits a written grievance on 10 January 2010 and makes a tribunal claim. The new regime applies as, although J may have had grounds for a grievance before 6 April 2009, she submitted her written grievance after 4 October 2009.

The employer takes action on 5 April 2009 which continues until 5 May 2009. K submits a written grievance on 5 June 2009 and makes a tribunal claim on 3 October 2009, and the case is heard by a tribunal in January 2010. The old regime applies as she submitted her written grievance (or presented her tribunal claim) before 4 October 2009.

The employer takes action on 5 April 2009 which continues until 5 November 2009. L submits a written grievance on 7 November 2009 and makes a tribunal claim on 4 May 2010, and the case is heard during June 2010. The new regime applies as the action continued beyond 5 April 2009 and the written grievance was submitted (or ET1 presented) after 4 October 2009.

The employer takes action on 6 April 2009 which continues until 5 November 2009. M submits a written grievance on 6 November 2009 and makes a tribunal claim on 4 May 2010, and the case is heard during June 2010. The new regime applies as the employer took action after 6 April 2009.

Choosing a regime

A number of key dates determine which regime applies. By choosing when to take action about a particular matter, employers may have a certain amount of control over this issue, at least during the transitional period. For employees, there may be less choice since they will be responding to action taken by the employer but since the uplift to an award is potentially higher under the old 2004 regime than under the new 2009 one, the incentive may be to make a grievance or submit a tribunal complaint before 6 April 2009. However, there may be circumstances where employees decide to delay making a tribunal claim – time limits permitting. One would be where there is a series of unlawful deductions of wages starting before 6 April but continuing after that date, since from 6 April, tribunals will have a new power to award additional financial losses incurred as a result of an employer's unlawful deduction.

Parallel regimes

As BERR points out in its guidance, a few cases which are decided under the pre-6 April 2009 regime may still be running into 2010 – for example, a claim submitted for an event which occurred on 3 April 2009 where a six month time limit plus a three month extension applies, which then takes three months to get to a hearing, will not reach the tribunal until 2010. BERR states that it is inevitable that there will be a period of parallel regimes to avoid taking away rights provided under the pre-6 April regime, adding that it will be clear which regime applies to any particular case. Nevertheless, the possibility that the old regime will operate well beyond the dates envisaged in the Transitional Order should be borne in mind.