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Employment law

It could be "back to the future" as the government makes yet another attempt to improve employment tribunals

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Out with the new. In with the... ?

How do you resolve disputes in the workplace in a way that is just and fair to employer and employee and is also cost-effective? How do you give proper protection to employees from unscrupulous employers?

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The Government thought it could achieve some measure of this, and reduce the number of tribunal cases, with the statutory discipline and grievance procedures introduced in 2004. Unfortunately it achieved none of these objectives. The statutory procedures have been described as "unfair and unduly complex", and "less than helpful... despite their laudable objective of smoothing the path to dispute resolution". They have also been described as "dense" and "rebarbative" (which for those of you, like me, to whom this word may be new means "tending to irritate or repel"). And those are just some comments from the courts! Hardly a week goes by without another judicial pronouncement on the subject.

The procedures, which make no allowances for individual situations, mean that if they apply and are not complied with, an employee may sometimes be barred from further remedy; an employer may face a claim where otherwise none would have existed; and either side may face a penalty of up to a 50 per cent uplift or decrease in any award made by a tribunal.

So, after a review last year, the Government is introducing yet another employment bill (which it hopes will make the statute book by the summer) to get rid of its recent creation. In its place, it plans an ACAS code to be taken into account by tribunals, an enhanced ACAS helpline and, again reversing recent constraints, more conciliation.

As proposed, the bill will replace the minimum statutory procedures with a new code which should be fairer and more flexible. It retains the employment tribunal's power to penalise either party for non-compliance with the new code (where failure to comply is unreasonable and where it is considered just and equitable to do so) by an alteration of up to 25 per cent (upwards or downwards) in any award made, albeit with greater discretion to the tribunal.

Whether change will be for the better will depend on the code and the latitude given to tribunals in its interpretation. Will this reduce the amount of litigation over interpretation of the rules? Will it be "out with the new; in with the old" – as we revert to the pre-2004 position where reliance is placed on a tribunal's assessment of procedural fairness and reasonableness? Or will it be "in with the newer" as we embark on another journey where uncertainty remains and minor failures will trip up the unwary?

Since the current law will remain until 2009, we are left to cope with the unwieldy, uncertain and unfair nature of the current rules, and the "spring clean" will need to wait until next year!

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