

**WHEN IS AN UNFAIR DISMISSAL NEVERTHELESS FAIR? THE STATUTORY
DISMISSAL AND DISCIPLINARY PROCEDURES, SECTION 98A(2) EMPLOYMENT
RIGHTS ACT 1996 AND “ POLKEY ”**

One of the areas that causes difficulties in the running of cases before an employment tribunal is the interplay between automatically unfair dismissals, unfair dismissals, dismissals which ought to be unfair but which, in fact are deemed to be fair and the operation of the “Polkey deduction” This article sets out to explain how the law now works in practice following the changes introduced in October 2004. The position has received judicial scrutiny in the two recent decisions in the Employment Appeal Tribunal of **Alexander v Bridgen Enterprises Ltd [2006] IRLR 422** and **Kelly- Madden v Manor Surgery [2007] IRLR 17**

When a dismissal is automatically unfair because the employer has failed to follow the steps set out in the new statutory disciplinary procedure introduced by Schedule I to the Employment Act 2002, [" EA 2002 "] **the tribunal** does not have to consider any other section of either the EA 2002 or Employment Rights Act 1996 [" ERA 1996"] it simply **proceeds to assess compensation** at a remedies hearing.

If, however an employer follows the statutory disciplinary procedures so that **the dismissal is not automatically unfair then the tribunal must go on to consider "fairness" under the provisions of Section 98 ERA 1996 in the normal way.**

Since the coming into force of Section 98A(1) ERA 1996, now in cases **where the tribunal takes the view , on the balance of probabilities, that any procedural failing on the part of the employer would have made no difference it must find the dismissal fair.** This is the effect of Section 98A(2) of ERA 1996 as explained in **Alexander** and **Kelly - Madden.**

Section 98A(2) ERA

"Subject to subsection (1), [automatically unfair dismissal for failure to follow the statutory dismissal procedures] failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98 (4) (a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure"

In the cases of **Alexander** and **Kelly - Madden** Elias P gave guidance as to how this section operates

- The tribunal, after dealing with the statutory procedures, must consider whether or not the dismissal would have been fair but for any procedural irregularity.

- "A *procedure*" referred to in section 98A (2) is not just confined to the employer's own disciplinary procedure. If the tribunal think that the employer should have taken any particular step but did not that is also " a *procedure*"
- The tribunal must come to a view, on the balance of probabilities, whether the employer's failure to follow "the procedure" would have made a difference.
- If the tribunal is at least 51% sure that the procedural failing would have made no difference and that the employee would have been dismissed in any event then section 98A(2) ERA comes into play and operates to make the dismissal fair.
- If the tribunal think that there was a chance evaluated at 50% or less that the failure would have made a difference then the dismissal is unfair but this finding will have an effect on compensation. The "Polkey deduction" will apply.

It will be seen that the employee is now worse off. Unlike the position before October 2004 there can never be a finding of unfair dismissal with a "Polkey deduction" in excess of 51%. If the tribunal think that there is at least a 51% chance that the employer's procedural failing would have made no difference then the dismissal is fair and no "Polkey deduction" is applicable.

On the other hand the tribunal might decide that the employer's procedural failing would not, on the balance have probabilities, have made a difference. In such a case the dismissal is unfair and the tribunal must consider compensation. However, at this stage they may consider making a " Polkey deduction" provided, of course that it is not greater than 51%.

Finally, even in cases of automatically unfair dismissals the tribunal may make a " Polkey deduction" when considering compensation.

A working example

The best way to see how these interlocking concepts work is to apply them in a working example.

The employer thinks that the employee has been stealing from him. He dismisses the employee

a) on the spot in circumstances where the modified procedure does not apply. The result will be a finding of automatically unfair dismissal and the tribunal will proceed to assess compensation.

b) in accordance with the statutory procedures and in accordance with his own disciplinary procedure and in accordance with all the steps that the tribunal thinks the employer should have taken . The result will be a finding that the employee was not unfairly dismissed and no question of compensation arises.

c) in accordance with the statutory procedure but fails to investigate properly the circumstances of the offence either in accordance with his own procedures and/or in accordance with the tribunal's view that this was a step that he should have taken.

- The tribunal takes the view that the failure to investigate would have made no difference because the results of the investigation would not have helped the employee. The tribunal thinks that it is 75% right [or any percentage at 51% or greater] in its view. The result will be a finding that the employee was not unfairly dismissed.

[Under the old law there would have been a finding of unfair dismissal and a 75% reduction in the compensatory award. The basic award would have been paid in full.]

- The tribunal takes the view that the failure to investigate might have made a difference because the results of the investigation might have helped the employee. It thinks that the employee may not have been dismissed. The tribunal estimates the chances at 30 % [or any percentage at 50% or less]. The result will be a finding of unfair dismissal but the compensatory award will be reduced by 30% The basic award will remain unreduced.

[No change from the old law. This would have been the position before 1 October 2004]

d) in circumstances where the statutory procedures were not adhered to, so the dismissal is automatically unfair but where the tribunal thinks that there was a chance that the employee would have been fairly dismissed in any event. Section 98 A(2) does not apply in a case of automatically unfair dismissal. The employee will receive his basic award. However the tribunal may apply any percentage range of "Polkey deduction" to the compensatory award, including a figure above 51%

This last scenario is precisely what happened in Alexander v Bridgen. The employees were made redundant. The dismissal was automatically unfair because the employer had not followed the standard procedure. The employees received their basic award. However the tribunal held that only those employees could have been made redundant. It reduced the compensatory award by 100%. The Employment Appeal Tribunal upheld this approach.

Marc Galberg
33 Bedford Row

19 February 2007