

## Process or destination?

I acknowledge the bold recommendations of the Gibbons review and its attempts to recapture the essence of resolution in the workplace. Many in the third sector understood the intentions of the 2004 Dispute Resolution Regulations which was to encourage the early resolution of disputes in the work place. It has been argued that the inflexible and prescriptive nature of the regulation has resulted in the process taking pre-eminence over the task of resolution. For example, the three step process which was intended to be simple has led to confusion and increased the need for legal advice impeding early settlements (Gibbons, 2007; 25; Pinsent Masons: 2007; 1).

SME's and the wider third sector are aware of the unintended consequences that have emerged from the introduction of the 2004 regulation. Nevertheless, whilst confusing and - in places - cumbersome this regulation has been the levee which through a process of experience, debate and consultation offers protection for the employee and employer. This is one of many examples where an attempt to bring to life the social contract of Hobbes in *Leviathan* - and more relevant - Rousseau in *The Social Contract* has been met with operational difficulties.

In a positive move the DTI have launched a public consultation on the issues raised by the Gibbons Review and unlike the rushed implementation of the Carter Review we welcome the government's promise to pilot any new approach.

The Gibbons review requests that *'those parties who have so strongly opposed the current regulations will as willingly accept the challenges that a different style of regulation will bring about'* (Gibbons, 2007:7). LAG welcomes this with the caveat that those new challenges do not overtly or inadvertently disadvantage the most vulnerable or place an unfair advantage in the hands of employers or those with sufficient resources with which to aid their endeavours.

Based on wider experience many in the third sector would welcome flexibility of the kind that would see elements of the 2004 regulation being interpreted '*purposefully*<sup>1</sup> rather than entirely literally thus being different from the '*Black letter*' law which is characteristic of most of our statutes. Our most pressing concern however is that the protection afforded by the Act is not weakened in attempts to make the process of resolution simple.

It is noted that for some small businesses the procedures have been problematic but we contest the relevance of Gibbons assertion that the informal culture in the small business sector have resulted in it being reticent to express problems in writing. The Review has presented no evidence to support this broad assertion or that this requirement leads to further conflict. Amongst the reasons for the 2004 Regulation was because there was a lack of transparency and protection for the employee and employer: rescinding this without an appropriate mechanism in place would lead to a significant loss of protection for all parties.

Our acceptance of the need for agreed procedures is not inconsistent with our expressed wish for a *purposeful* interpretation of the regulation: we are of the opinion that employees should be

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<sup>1</sup> In a similar way to the Human Rights Act 1998 (HRA)

protected and that employers should not ignore procedures i.e. employees can be dismissed for a 'fair' reason but employers should not flaunt agreed procedures/protocols or the rules of natural justice in making and implementing their decisions.

Gibbons alludes to the increase in formal proceedings which in the retail sector has been up to 40% (Gibbons, 2007: 2.10). We acknowledge that legislation should not hamper businesses from trading but we must return to the obvious protection provided for the employee which will result in employee and employer being increasingly discerning and transparent.

It is clear that many employers are woefully ignorant of their legal responsibilities towards their employees and many obstacles to resolution occur due to this lack of knowledge; I believe that through education and raising awareness the impact and increase of these actions can significantly be reduced.

In conclusion, I do not subscribe to a wholesale repeal of the 2004 Dispute Resolution Regulations but wish to see an incremental and appropriate realignment of it.

The overriding aim and that of the government is to improve the quality of dispute resolution in the workplace. This can only be achieved if we approach this as a process and not as a destination: if viewed as a destination then sadly we have already arrived and we can only tinker with what we have; if however it is a process then we have something that will evolve as needed.

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