

On 23 November 2011, the government not only published its response to the January consultation paper on resolving workplace disputes but also announced a number of other proposals that could change radically many fundamental employment rights in the workplace.

The government has stated that the aim behind such widespread changes is to increase business confidence and to remove obstacles preventing employers from recruiting. However, the counter argument is that the scope of these dramatic changes may lead to a degree of uncertainty as to what the law will and will not allow. One of the main difficulties that employers have faced in recent years is the problem of keeping abreast of frequent changes in employment law. During what appears to be a significant transitional period in terms of employment rights, such a task will become even more problematic.

The resolving workplace disputes consultation document contained a number of proposals aimed at reducing the number of claims being lodged at the Employment Tribunal and improving the system dealing with these claims.

## The tribunal reforms

We now know that as from April 2012 the following changes will take effect:

- In order to deter weak claims the Employment Tribunal may order that a deposit be paid before the case can proceed if it appears that a claimant has little prospect of success. From April, the maximum deposit that can be ordered will increase from £500 to £1000.
- Where a party has acted unreasonably in conducting the proceedings the Employment Tribunal may award costs against that party. The current maximum award stands at £10,000 but this will increase to £20,000.
- To speed up the hearing process there will be a change to the Tribunal rules so that witness statements should be taken as read rather than the witness having to read it out aloud in front of the

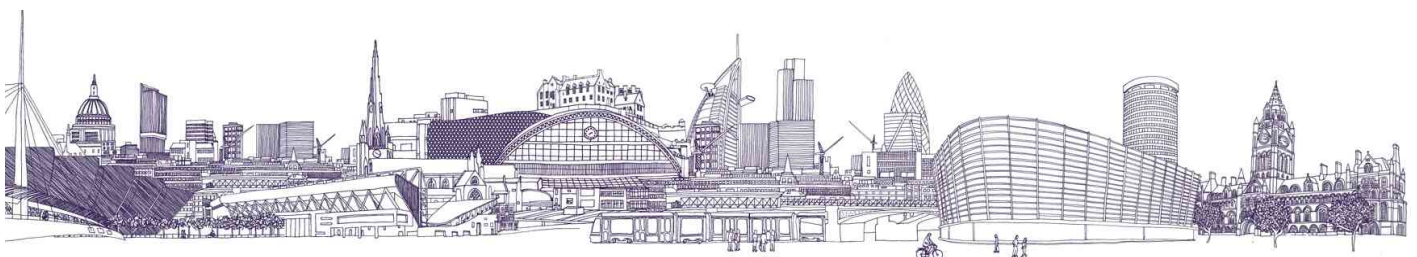
Tribunal.

- To reduce the cost of hearings, the state will no longer pay witness expenses, but the Tribunal will be given the power to order a party to pay a witness's expenses.
- A further measure to reduce costs is for Employment Judges to sit alone when hearing unfair dismissal cases rather than having a panel comprising a judge and two lay members.
- The unfair dismissal qualifying period will be extended to two years from one year. There will still be exceptions where the employee will not need any minimum period of service before they can bring a claim, for example where the employee has been dismissed for asserting a statutory right or making a protected disclosure.
- The formula for up-rating Employment Tribunal awards and statutory redundancy payments will also be modified 'at the earliest opportunity'. The awards will in future only be rounded to the nearest pound.

## Further proposals

Additional practice changes will come into effect during the course of the next year. As a first step, the President of the Employment Appeal Tribunal will conduct an independent review of the existing rules of procedure governing employment tribunals. This is expected to lead to an entirely new set of Tribunal rules being produced next year when the full report from the 'fundamental' review is produced in April.

One way in which the government is hoping to reduce the number of claims reaching the Tribunal is to make it a requirement that all employment claims will have to be lodged with Acas for pre-claim conciliation before the claim can be submitted to the Employment Tribunal. A new form, shorter than the current ET1, will be introduced for the claimant to complete and send to Acas. It remains unclear at the moment, however, whether there is to be any financial penalty for refusing unreasonably to



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participate in the conciliation process.

It does appear certain that there will be financial penalties introduced where an employer is found to have breached an employment right. In the event that the claimant succeeds the Employment Judge will be able to make an order that the employer pays an additional sum equivalent to half of the award made in favour of the employee. This payment will be made to the government, not the claimant, and will be subject to a minimum penalty of £100 and a maximum penalty of £5000. Prompt payment of these 'fines' will be rewarded as there will be a 50% reduction if payment is made within 21 days of the judgment.

The payment of penalties is one way that the government is looking to make the Employment Tribunal Service pay its way. The other main means of generating money from the service will be from the introduction of fees for submitting claims. We do not yet have details of how this will work. Consultation will start next year to consider options which include requiring an initial fee to lodge a claim then a second fee to proceed to a hearing, or to impose greater fees for those seeking higher awards, for example above £30,000. It may be some time yet before the details are agreed and fees finally brought in. When they are in place the government envisages that there might also remain a free option through what will be known as a 'rapid resolution' scheme. Details are sketchy at present but the development of such a scheme will aim to offer a quicker and cheaper alternative to determination at an employment tribunal.

## Employment law reforms

In addition to the proposals for changes to the Employment Tribunal system, announcements were made regarding proposals to make changes to some key employment law rights.

### Unfair dismissal

The government will carry out public consultation on the following proposals:

A proposal to introduce compensated no fault dismissal for firms with fewer than 10 employees. It is thought that the fixed sum of compensation could be equivalent of the statutory redundancy payment.

Ways to slim down existing dismissal processes, including potential changes to the Acas Code of Practice on disciplinary and grievance procedures and the supplementary guidance. The Code sets out best practice regarding procedures that employers should follow in any disciplinary or grievance matter. Implementing changes to take away procedural safeguards would be a significant

change to the law particularly as the code is taken into account by Employment Tribunals when assessing whether a dismissal is fair or unfair.

### TUPE

Consultation has been launched on whether changes can be made to simplify the Transfer of Undertakings (Protection of Employment) Regulations 2006. In particular, questions are asked as to whether the provisions specifically concerning service provision changes have been helpful; whether restrictions on post transfer changes can be relaxed to allow for changes that are not to the employee's detriment; whether all liability for claims should continue to pass to the transferee and whether further clarification is needed in relation to the insolvency provisions.

### Redundancy

Consultation has also been launched on whether the minimum periods for collective consultation can be reduced in relation to 100 or more redundancies from 90 days to 60, 45 or 30 days.

It asks also whether guidance should be issued regarding what is an 'establishment' for the purposes of the collective consultation process and whether the inter-relationship between the consultation requirements on a transfer and on multiple redundancies can be improved.

### Whistleblowing

The legislation is to be amended to ensure that breaches of express or implied provisions in the employee's contract do not amount to protected disclosures. This will close what the government has described as a loophole in the law.

### Agency and employment business regulations

Early next year there will be consultation on streamlining the current regulatory regime for the recruitment sector.

### CRB checks

A universally portable CRB check will be developed that can be viewed instantly by employers online.

### Protected conversations

Currently if an employer raises any issue with an employee it may be used as evidence in any claim that the employee subsequently brings. The only exception is where the conversation is expressed as being 'without prejudice', but, in order to come under this description, there has to be a dispute in existence and the discussion must be with a view to settlement. Consultation will start next year on 'protected conversations' which will allow employers to discuss issues like retirement or poor performance in an open manner with staff - without the discussion being used in any subsequent tribunal claims.

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Unlike without prejudice discussions, there will be no need for a dispute to be in place before the conversation can take place, but there is still likely to be an exclusion in relation to discriminatory acts or comments.

## **Compromise agreements**

There will be a further consultation on measures to simplify compromise agreements where employer and employee wish to settle certain specific legal claims and enter into an agreement which satisfies formal requirements under the relevant pieces of legislation governing the statutory claims which the employee may have against the employer.

Responses to the consultation on resolving workplace disputes showed that the use of these agreements was much wider than expected and the government has decided to take action to make these agreements easier and cheaper to implement.

Under their new title of 'settlement agreements' a standard form will be introduced which will allow for settlement of all past and future claims without the current requirement to list all specific claims. Further standard clauses may be added to the model form to meet the particular requirements of the employer but generally it is considered that the changes will limit the amount of legal advice that will be required.

## **Maternity and paternity provisions**

Rules regarding parental leave are to be 'modernized', with emphasis on greater involvement for fathers.

## **National minimum wage**

The regulations governing the national minimum wage are to be simplified by merging everything into one set of regulations

## **Sickness absence**

The government will issue a response to the recently published independent sickness absence review. This review proposes the creation of a state-funded independent assessment service to which employers or GPs can refer employees in longer-term, more complex sickness absence cases. The proposed service would be accessed at the four week absence stage, be provided by suitably qualified medical professionals and would offer advice about how an individual taking sickness absence could be supported to return to work.

## **Flexible work**

The government also proposes to extend flexible working to all employees. This could be a challenge to employers which rely on shift work.