

Employment Law Reform – What's on the Horizon?

Employment Breakfast Briefing – 26 April 2012

Richard M Fox, Partner and Practice Area Leader
Martin Pratt, Senior Solicitor

Programme of Change – Plans by the Coalition Government

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Three categories:

1. Changes now in force (as of 6 April 2012) via secondary legislation.
2. Changes almost certainly to come into force within the next 12 to 24 months.
3. Ideas out for consultation and for which the debate is still continuing.

Minor Financial Changes

I will not be talking about the following changes that took place on 1 April:

- Statutory maternity) £128.73
- Paternity) to
- Additional paternity) £135.45
- Adoption pay) per
- Maternity allowance) week

- Statutory sick pay £81.60
to
£85.85

The Government's objectives are:

- To remove “barriers to growth and job creation” (particularly in the SME sector)
- To make the UK the “best place to start and grow a business”

Employment Law Review – Annual Update 2012

*The strong focus in the past on the rights of the employee and the responsibilities on the employer has also led to **a perception** held by many that the relationship is one-sided – with all the onus on the employer and none on the employee to make the relationship work and give of their best (Paragraph 1.7).*

The 2 Fundamentals

1. Encouraging Mediation and Pre-claim Conciliation
2. If the system has to go to litigation – making the process as “*swift, user-friendly and effective*” as possible.

The Context: The Lobbying

- *Change of Government – May 2010*
- *British Chambers of Commerce “Employment Regulations: Up to the Job – March 2010*
- *CBI Report “Making Britain the place to work: An employment agenda for the new Government” – June 2010*
- *The Federation of Small Businesses – policy paper on Tribunal procedures – August 2010*
- *Institute of Directors Business Manifesto – 2010*

... **Resolving Workplace Disputes – 27 January 2011**

And **Government Response to Resolving Workplace Disputes – 23 November 2011**

Changes into Force on (Good Friday) 6 April 2012

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Qualifying period for unfair dismissal claims (*and also to request a written statement of reasons for dismissal*) increases from one year to two years

Only applies to those starting a new job on or after 6 April 2012

The Government estimates this will reduce claims by 2,000 per annum

The Industrial Jury - RIP

Employment Judges will normally sit alone when hearing **unfair dismissal** cases

- *Parties can request a tripartite panel*
- *This will be accepted or rejected at the discretion of the Employment Judge*

Deposit Orders

Maximum deposit order will increase from £500 to **£1,000**

... where contentions put forward by a party have “little reasonable prospect of success”

... c.f. the power to strike out (no reasonable prospect of success) and how that may change (any time, not just PHR's, hearings not necessary, even before ET3 is filed etc)

Witness Evidence & Expenses

- A Witness statements to be taken “as read” unless the ET directs otherwise**
- *So in most cases a witness will not read out his witness statement before being cross examined*
- B Witness expenses are to be borne by the parties**
- *Employment Judge will be able to order that a party to the litigation reimburses a witness for the costs of the expenses of attending a hearing*
 - *The losing party may be ordered to reimburse the winning party for any such costs that could have been paid out*
 - *Witnesses will no longer be able to claim expenses from Government funds*

Costs Orders

The maximum costs order that a Tribunal can make without having to refer for assessment to the County Court increases from £10,000 to £20,000

Will this make any difference?

The power to have costs assessed, remains

Section 147 of the Equality Act

- Makes it clear that a representative instructed by the employee **can** be an “independent adviser” for the purpose of a compromise agreement
- *Therefore:-*
 - (a) can advise on the effect of a compromise agreement.
 - (b) can sign it off

Tribunal Fees

The decision to introduce Tribunal fees has already been taken (without consultation)

Two options:-

1. Issue fee (eg. between £150 and £250) plus hearing fee (eg. between £250 and £1,250) (2013); or
2. Issue fee only – level based upon what the Claimant states their claims are worth (eg. £500 to £1,750) 2014)

- *Annual Cost of ET's = £84 million*
- *MoJ – Annual Contribution via tribunal fees expected to be = £10 million*
- *What will happen to PCC – will employers delay to see the colour of the employee's money?*
- *Employers at risk for ET fees if they lose the case.*
- *Non refundable, under any circumstances, so any settlement will have to take fees into account*
- *Prospects of satellite litigation eg. the remission system*

ET Guidance

- Changes to guidance on Tribunal Application and Response Forms
- To include the average value of awards and the time taken to reach a hearing

Reforms to be Implemented via Primary Legislation “as soon as Parliamentary Time Allows”

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Tribunals are to be able to levy **financial penalties** payable to the Exchequer on employers who are found to have breached employment rights

where the employer’s behaviour in committing the breach had “aggravating features”

(as a result of feedback from the RWD consultation – employment judges are to be given discretion in exercising this power - so as to ensure employers are not penalised for inadvertent errors)

ACAS – Enhanced Role

All employment disputes are to be offered ACAS pre-claim conciliation before going to a Tribunal

(Not expected until at least April 2014)

“We want to encourage individuals to have OPEN and FRANK conversations as issues arise, allowing employers to manage their business, and individuals their careers, more effectively whilst minimising the number of situations that develop into formal disputes”

- Privileged/without prejudice discussions with employees that cannot be referred to in open court even if there is no *“pre-existing dispute”* (*BNP v Mezzotero 2004*)
- *Poor performance*
- *Early retirement*
- *Should it protect against discriminatory statements/representations?*

Mediation

- “Compromise agreements” to become “settlement agreements”
- Standard wording – via a “*model agreement*”
- More “workplace mediation”
- More pre-claim conciliation through ACAS (*clear accessible information to enable claimants to judge the value of pursuing a claim and the likelihood of success – eg. likely value awards / average length of time for the process*)
- Government has admitted it has little information on the extent to which mediation has been successfully used – but that may change in the future

Employment Tribunal Rules

- Lord Justice Underhill
- Fundamental review
- Will “*develop and recommend a revised procedural code, with a view to ensuring that robust case management powers can be applied flexibly and proportionately in individual cases coming before employment tribunals*”. (Employment Law Review Annual Update 2012 paragraph 3.6)
- Lord Justice Underhill anticipates:-
 - *shorter rules*
 - *simpler language*
 - *practical guidance*

A proposed special regime for Micro Businesses

Employers with 10 or fewer employees may be allowed to engage in “no fault” dismissals on payment of a prescribed amount – possibly equivalent to a statutory redundancy payment.

- Vince Cable – sceptic!
- *“Not all jobs work out for both parties – the staff member doesn’t quite fit or simply the relationship has irretrievably broken down, and for micros in particular, who often don’t have legal or HR teams, the process to let a staff member go can be a daunting and complicated process”*
- Call for evidence closes on Friday 8 June 2012

- The current 90 day consultation period – mandatory where 100 or more redundancies are proposed in a 90 day period, might be reduced to 60, 45 or 30 days
- So called “gold plating” for the purposes of TUPE may be scaled back

Thank you for listening

... and now for our practical example

26 April 2013...they do things differently in the future...

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Google

Event deleted Undo

Calendar Today < > April 2013 Day Week Month

CREATE

April 2013 < >

Mon	Tue	Wed	Thu	Fri	Sat
1 Apr	2	3	4	5	6
8	9	10	11	12	13
15	16	17	18	19	20
22	23	24	25	26	27

My calendars

- Martin Pratt
- Tasks

Other calendars

-
- Weather

Phil is an HR manager ...



His company has two problem employees...

Steve – employed on 2 April 2012



Greg – employed on 9 April 2012



On 26 April 2013 this happens...

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Investigation

- The fight appears to have been started by Greg
- Greg says he was reacting to abuse from Steve that centred on Greg's perceived sexual orientation
- Both are on final warnings regarding their behaviour in the office
- Phil has to advise management as to the possible risks of a claim if either or both of Steve and Greg are fired
- Steve – Just over 1 year service **BUT** hired before 6 April 2012 and therefore had unfair dismissal rights
- Greg – also just over one year service **BUT** hired after 6 April 2012 and therefore has no unfair dismissal rights
- Steve is called to a disciplinary by Phil. Greg is not...

The aftermath...

- Steve fired after disciplinary
 - > Brings unfair dismissal claim – says he was defending himself from Greg

- Greg fired without disciplinary
 - > Brings religion/belief harassment claim based on Steve's words
 - > Also discrimination claim as he did not get a disciplinary hearing, *unlike Steve*



Employment Tribunals Claim Form

This interactive form enables you to make a claim to an Employment Tribunal by completing and editing the form. You can save a part of a fully completed form, email a saved form to another person to amend or for approval, and submit it securely online to the Employment Tribunals. Please make sure you have read the guidance notes on our website to make a claim before you fill in the form. We are unable to accept any attachments included or sent with this form.

Multiple Claims – If this claim is one of a number of claims arising out of the same or similar circumstances please complete a claim form for the first claimant and then give the other claimants on the multiple form (maximum 28 claims). If you have 28 claims need to be submitted please create a multiple claims .csv file.

For guidelines please click here <http://www.employmenttribunals.gov.uk/multiple/index.htm>, enter the details in the correct column and attach the .csv file to this form below before submitting this claim form.

For Claimants in England and Wales - If someone is advising or representing you in relation to your claim, unless they are a practising solicitor or barrister, be authorised to do so, wherever they are based (including the Channel Islands and all of Europe). Trade Union officials, Citizens' Advice Bureau advisors or a personal friend you present your claim may be exempted from these requirements. However, to check your representatives status for more information, telephone 0845 450 6858 or go to www.claimsregulation.gov.uk

Select the type of claim you wish to make:

- I want to make a claim.
- I want to make a claim on behalf of more than one person.

Phil's reaction...



...before seeking advice

- Kingsley Napley advise that the decision to dismiss Steve was within “the range of reasonable responses” open to the company and suggests applying for a Pre-Hearing Review (PHR) to get the claim struck out as having “no reasonable prospect of success
- KN apply for, and are granted, a PHR on behalf of Phil’s Company to seek a strike-out of his claim
- At the PHR Steve asks for a full, 3 person, Tribunal panel. He thinks he has more chance with an “industrial jury”
- The Tribunal say “no” to a 3 person panel, ordering the hearing to be heard by a judge alone
- Tribunal also refuses strike out BUT order Steve to pay a £1,000 deposit before continuing. Steve cannot afford this, and doesn’t fancy his chances before a judge alone, and withdraws his claim

Greg's Claim

- The Tribunal orders a Case Management Discussion to consider progress of the case
- Kingsley Napley advise Phil to consider using the CMD to apply for mediation – a private forum and one which could allow the parties to come together without damaging publicity. Nothing guaranteed but we may have a weak case that could be damaging
- Phil agrees
- Greg doesn't and argues against mediation at tribunal
- The tribunal, taking into account the new regime, accepts the application made by Kingsley Napley for judicial mediation
- Case goes to judicial mediation

Towards the hearing of Greg's claim...

- Mediation does not achieve settlement. Greg wants his “day in court” and will not countenance deal. However, some signs of movement.
- Tribunal orders hearing over 10 days with full, 3 member, panel as this is a discrimination harassment claim
- Greg applies for an order to read out his statement in full. Wants maximum publicity against Phil's company – a major part of his strategy
- Tribunal refuses application – the new regime means that statements must be taken “as read”
- Greg, having lost a major plank of his strategy, reconsiders, and approaches Kingsley Napley with an offer close to closing mediation position
- Phil's company accepts and a compromise/settlement agreement is signed – safe in the knowledge that his lawyer's certificate renders the agreement binding...

Questions

Richard M Fox

Partner and Practice Area Leader
Kingsley Napley LLP
rfox@kingsleynapley.co.uk



Martin Pratt

Senior Solicitor
Kingsley Napley LLP
mpratt@kingsleynapley.co.uk

