All change: sweeping reforms to the employment tribunal system

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The Government has proposed introducing a series of employment tribunal reforms, aimed at addressing concerns raised by businesses (and small businesses in particular) that employment tribunals have become overly costly and time-consuming.

Last year the number of employment tribunal claims rose to a record 236,000, with each claim costing (on average) thousands of pounds to defend. The Government says it is concerned that the current employment tribunal system is constraining economic growth in the UK, as businesses have become sensitive to how easily they might be drawn into employment litigation. There is also a perception amongst businesses that employment tribunals offer disproportionately greater protection to employees than to employers.

The Government believes its proposals will go some way towards correcting these perceived imbalances. We look at each key proposal in turn, and give our views on the effect these will have in practice. The key proposals are:

- an increase in the qualifying period for unfair dismissal (to 2 years)
- fines (up to £5,000) payable by employers who breach employment rights
- a new fee system for employment tribunal cases
- a new system requiring claims to be submitted to ACAS before the Employment Tribunal
- an enhanced case management regime to help filter out weak cases
- a change to the costs regime to encourage parties to make and accept reasonable settlement offers
- other changes to the tribunal process to help speed it up

These proposals are set out in the Government's consultation document, published on 27 January 2011.

Increasing the qualification period for unfair dismissal claims

The unfair dismissal qualification period has always been a political football. When it was first introduced, in 1971, the qualification period was six months. Early in the first Thatcher administration, in 1980, the period was increased to one year, or two years for businesses with twenty or fewer employees. In 1985, it was increased to two years in all cases. During the first Blair Government, in 1999, it was reduced back to one year. It is of no great surprise then that soon after the change of party in Government, there is once again a proposal to increase the qualification period.

Some argue that increasing the qualification period disproportionately affects certain groups in society, for example women who tend to have shorter periods of service because of childcare-related career breaks. In the 1990s this was judicially tested by two women, Ms Seymour-Smith and Ms Perez, who had been dismissed after one year, but before two years, of employment. They complained that the then two year qualification period indirectly discriminated against women (for every ten men that qualified, only nine women did). Their cases went all the way to the European Court of Justice, and then back to the House of Lords, taking nine years in all (and not being finally decided until after the Labour Government changed the statutory qualifying period back to one year). During this time, thousands of people with between one and two years' service lodged tribunal claims which were stayed pending the decision in the case. Ultimately, the challenge failed and all the stayed cases were dismissed. However, the case was decided on labour force figures from the date of dismissal in 1991, when the disproportionate effect was judged to be borderline. If the figures today are less favourable to women, there is every prospect of a renewed challenge to the increase, with the result that thousands more claims from individuals with between one and two years' service could be put on hold for years.

Fines for employers who are found to have breached employment rights

The Government's proposals envisage introducing automatic financial penalties for employers who are found to have breached employment rights (in addition to the ordinary compensation already payable).

The penalty would be payable to the Exchequer and would generally be half the amount of the total award made by the Employment Tribunal, subject to minimum and maximum thresholds of £100 and £5,000. Tribunals would have the discretion to cancel the automatic penalty in

exceptional circumstances (which the Government has hinted could include being a small employer). The penalty would also be reduced by 50% for prompt payment (within 21 days). There is a similar system already in place under the National Minimum Wage Act.

The Government hopes this system of financial penalties will send a clear message to employers that they must comply with their employment law obligations, whilst giving claimants no additional personal financial incentive to pursue claims.

A critic might argue that this has the appearance of being a sop to those with employee interests at heart, in order to present the Government's proposals as being even-handed. It is strangely redolent of Labour's ill-fated attempt to automatically increase compensation payable to employees where employers had breached a basic statutory dismissal or grievance procedure, a reform which was hastily reversed (although remnants remain in discretionary form).

If this proposal has any effect on the litigation itself, it will be to increase the pressure on employers to settle, regardless of the merits of the claim, in order to avoid the risk of the financial penalty. This does not seem to be in line with the purpose of all the other proposals (but will both save and earn money for the Exchequer).

Introducing a fee system for employment tribunal cases

At present, it does not take long to issue an employment claim on-line and there is no cost to do so.

The Government has suggested that levying fees on users of employment tribunals could incentivise earlier settlement, disincentivise the pursuit of weak or vexatious claims and also help to shift the cost burden of the tribunal system from taxpayers in general to those who make use of the system.

To date, no specific proposals have been put forward. The Government has said it proposes to consult on how best to implement a fees mechanism in the Spring, once it has developed options more fully and considered the likely impact on the system and specific categories of user.

There is currently a great deal of speculation in the press over whether claim fees will be fixed or linked to an aspect of the claim, for instance a fee equal to one week's pay.

A claim fee (whether fixed or variable) is likely to deter claims by less well-paid employees but have little effect on the better-off issuing high-value claims. There is a serious risk that this will act as a barrier to justice to those the tribunal system was designed to protect, without really benefitting employers who are on the receiving end of unmeritorious claims. The main beneficiary will obviously be the Exchequer.

Submitting claims to ACAS

Despite the current employment tribunal system making some provision for conciliation between the parties, there is no formal requirement for parties to conciliate.

The last Labour Government tried to encourage conciliation, and discourage last-minute settlements, by making ACAS conciliation available only for a limited period. That reform failed completely and was soon reversed. Now the Coalition is having a go.

Under the proposed regime, an additional pre-requisite step would be introduced before a claim form can be submitted to the Employment Tribunal. A potential claimant would have to submit key details of their dispute to ACAS within the normal time limit (3 or 6 months, depending on the nature of the claim), which would serve to 'stop the clock' on the applicable time limit. Thereafter, ACAS would have a period of time (currently suggested to be one calendar month) in which to attempt pre-claim conciliation.

In the event that the conciliation is successful, a legally binding settlement agreement (in form 'COT3') would be signed by the parties, meaning that no claim could be brought. However, if conciliation is rejected by one of the parties, or is unsuccessful within the allocated period, ACAS would write to the claimant certifying that the pre-claim conciliation stage had been completed, and the clock on the applicable time limit would start again. The claimant would then have to submit the claim form to the Employment Tribunal in the normal way (together with a copy of the ACAS certification).

This is likely to create more confusion and litigation over the time limits and is unlikely to have a material effect on the number of claims which settle. The Government estimates it will lead to a reduction of approximately 12,000 claims being lodged with the Employment Tribunal. On its own figures (showing that 236,000 claims were submitted in the 2009/2010 year) this is an estimated reduction in claims of approximately 5%. Given the extra funding that will need to be given to ACAS to provide this service, one might legitimately query the value of this proposal.

Filtering out weak cases

Employment Tribunals have the power to filter out weak cases, either by striking them out or ordering claimants to pay a deposit to continue with them. However, the strike out and deposit order mechanisms are not as straightforward as they could be, and they are also underused generally.

The Government recognises that it is a common criticism of Tribunals that they do not 'vet' claims robustly enough, and this means many employers will 'buy-off' claimants simply to avoid navigating the system. Accordingly, it has proposed changes to the strike-out, deposit order and costs procedures, which it hopes will address this perceived problem.

Most notably, the Government wants to:

- allow more strike-out applications to be dealt with on paper or at Case Management Discussions (which happen routinely in most cases) rather than needing to have a separate 'Pre-Hearing Review' on the issue
- have greater flexibility to make deposit orders and increase the maximum deposit from £500 to £1,000
- increase the cap on costs awards from £10,000 to £20,000

- (perhaps less radically given the current flexibility for completing response forms) allow employers to submit short-form responses to claims and to request more information from claimants before having to submit more detailed responses

However, the Government also says it wants to safeguard against employers abusing these changes and applying undue pressure to claimants (particularly unrepresented claimants) to withdraw claims. It has suggested, for example, that Tribunals might be encouraged to make costs awards against employers who make unmeritorious strike-out applications.

Other changes to the costs regime

The Employment Tribunal system was designed as an informal system to facilitate access to justice for wronged employees. Its costs regime – which follows the general rule that each party bears its own costs, whatever the outcome of the case – is at its core. Costs can be awarded against a party in only very limited circumstances – for example, where they have behaved 'vexatiously, abusively, disruptively or otherwise unreasonably' – and Tribunals will not make costs awards lightly. They are still few and far between.

This can be particularly frustrating for employers who wish to make sensible settlement proposals. Whilst it can be argued currently that refusal to accept a reasonable settlement offer should give rise to a costs award against the refusing party, there is no formal system in the Employment Tribunals (like that which exists in the Court system) to deal with the specific issue of the interplay between settlement proposals and costs. The Government is looking at changing this.

The Government has stressed that it is not looking to introduce a general cost-shifting regime – which would change the whole ethos of the system – but it does want to make subtle changes to encourage parties to behave reasonably when considering settlement. It has therefore suggested introducing a formal mechanism for settlement offers to be communicated through the Employment Tribunal. Any offers made using this mechanism would be protected from disclosure to the Tribunal panel who hear the claim, only being revealed once the panel had reached its decision and assessed, if appropriate, the level of compensation to be awarded to the employee. At this stage, the panel could be told of the offers and it could adjust the award of compensation to take into account any unreasonable refusal to accept an offer.

This move by the Government, to formalise the interplay between settlement offers and costs, has to be encouraged if we are to see greater numbers of parties to a dispute taking reasonable settlement offers seriously. The Government is consulting over issues such as whether it should apply only where the parties are legally represented, and the detail of the precise effect on compensation awards.

Other changes to the tribunal administration and hearing process

Employment Judges sitting alone

The current system provides for a three member panel, consisting of a legally qualified employment judge and two 'lay-members'. Traditionally one lay-member was appointed by the TUC and another by employers' organisations but this is no longer the case. The purpose of the lay-members was to bring industrial experience to the Tribunal. Under the current proposals, where appropriate, employment judges could elect to sit alone in cases, which, it is hoped, should serve to utilise resources more efficiently. This would certainly be cheaper to operate. It may mean that Tribunals become yet more legalistic and leave their roots as a more informal way of resolving cases with an eye to 'fairness' and real-life practice. That said, this has been the trend over the past forty years anyway.

Administration

One of the key criticisms levied at the Employment Tribunal system at the moment is its administration. The system is creaking under the weight of claims and, in particular, the weight of pre-hearing correspondence that Judges are required to get involved in. The system simply cannot cope. More and more hearings are being postponed because of lack of availability of Judges, and the time it takes for Tribunals to deal with correspondence is ever increasing.

One proposal the Government has made to tackle this problem is the use of suitably qualified legal officers, instead of Judges, on pre-hearing work. If this frees up judicial time, it is to be encouraged; however, it is critical that Tribunals recruit legal officers with the right qualifications and experience to ensure that the system does nor forego skill in favour of speed.

Another proposal made by the Government, which is seemingly fairly innocuous, is to bring its 'overriding objective' (of dealing with cases justly) in line with the equivalent objective of the Courts. The key difference at the moment is that the Employment Tribunals' overriding objective does not highlight a need to look at the system as whole, rather it is focussed on individual cases. This change means that justice in an individual case might, in the future, have to be counter-balanced against looking at achieving justice in the Tribunal system as a whole. At the moment, individual employees and employers can complain if their particular case is not being handled fairly, but there is likely to be reduced scope for such complaints if the Government's proposal reaches the statute book.

The Employer's Charter

The Employer's Charter is designed to provide clarity to employers regarding what can be done (in general terms) when managing employees, including what questions can be asked of employees, and what steps can be taken in respect of them. The Charter can be found on the BIS website.

The Employer's Charter touches upon a number of core employment law areas, including maternity rights, redundancy, performance issues and flexible working requests. It is very basic and is unlikely to make any real difference in practice. Whilst some employers might find the Charter reassuring, as ever the devil is in the detail and it is noteworthy that the Charter concludes with the line "Of course, individual circumstances may vary and employers should act in accordance with their legal obligations."

Next steps?

On making the announcement, the Government opened a period of public consultation on the proposed reform, which is due to close on **20 April**

2011.

Anyone may respond to the consultation, so if you want to tell the Government what you think, click here to access the consultation document. Details on how to respond to the consultation (which poses 64 questions to interested parties) can be found on page 57. Responses can be submitted online.

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