Employment Tribunal litigation – understanding the changes

March 2013

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Introduction

The Government's ongoing review of employment law captures almost every aspect of the employment relationship. The Employment Tribunal system is at the heart of many of the Government's proposals, as the aim is not only to encourage the early resolution of workplace disputes but also to simplify the Employment Tribunal process.

Many of the changes to the tribunal system proposed by the Government will have an impact on employers. As the changes come into force during the course of this year, employers may find that they need to modify their approach to resolving workplace disputes and consider alternative strategies when handling Employment Tribunal litigation.

This briefing note highlights the key changes:

Early conciliation

Current position

At present, if an individual issues an Employment Tribunal claim, they must submit an ET1 form. This form is sent to the employer who then submits an ET3 form in response. Details of the claims lodged with the Employment Tribunal are, where appropriate, passed to the Advisory, Conciliation and Arbitration Service (ACAS), which has a statutory duty to offer parties the opportunity to conciliate the matter. If ACAS conciliation is successful, the parties can enter a binding agreement (COT3 settlement) which settles the dispute and ends the Employment Tribunal process. If conciliation is unsuccessful, the matter may be determined at a tribunal hearing.

According to the Government, employers are worried about the prospect of Employment Tribunal claims being brought against them and this concern can affect their decision to take on staff. Claimants can also face significant cost and stress in pursuing a claim.

Government proposals

The Government believes that resolving disputes in the workplace is far less costly to both parties, delivers more positive results in terms of continued employment and business productivity and saves money for the Government by reducing demand on HM Courts and Tribunals Service. Conciliation can also deliver outcomes for individuals that are not possible at an Employment Tribunal (e.g. an agreed reference or an apology).

The Government therefore announced its intention to introduce Early Conciliation (EC) in November 2011, in its response to the 'Resolving Workplace Disputes' consultation, as the first part of the process to simplify and streamline the Employment Tribunal system. The EC process would make it a requirement for most prospective claimants to send the details of their claim to ACAS before they are able to lodge the claim with the Employment Tribunal. This would enable ACAS to offer the parties the opportunity to resolve their dispute without the need for tribunal involvement. The Enterprise and Regulatory Reform Bill provides the legislative foundations for the EC process, which is expected to be introduced from spring 2014.

The EC consultation, issued on 17 January 2013, sets out how EC is intended to operate. The key stages are as follows:

- **Contact ACAS** - Prospective claimants will need to contact ACAS before lodging their claim with the tribunal. This involves submitting an EC form to ACAS, providing the name, address and contact details of the claimant and the respondent. When a completed form is received by ACAS, the prospective claimant will have satisfied the EC requirement and the limitation period for bringing the relevant claim(s) will be suspended (i.e. the clock will stop) to allow conciliation to take place.

- **Early Conciliation Support Officer contact** - An Early Conciliation Support Officer (ECSO) will make telephone contact with the prospective claimant. The ECSO will check the details supplied by the prospective claimant and outline the EC process. The ECSO can discuss any misunderstandings surrounding the prospective claim or qualifying periods.

- **Conciliator contact** - The ECSO will pass the relevant details to the conciliator, who will then contact the prospective claimant. Where the prospective claimant wishes to attempt to settle the dispute, the conciliator will contact the prospective respondent. Where both parties agree to EC, the conciliator will have up to one calendar month from the date of receipt of the EC form to facilitate a settlement between the parties. This period may be extended by up to a further two weeks if there is a reasonable prospect of achieving a settlement.
The EC certificate - If the prospective claimant cannot be contacted by the ECSO, the case will be closed by issuing a certificate to confirm that the prospective claimant has complied with their obligation to contact ACAS. The prospective claimant will then be able to present a claim to the tribunal, should they wish. Similarly, where, following a conversation with the ECSO, the prospective claimant concludes that are unlikely to be able to bring a claim (e.g. because they are out of time) and does not wish to participate in EC, ACAS will issue a certificate. If EC is unsuccessful, the prospective claimant can proceed to present their claim at the Employment Tribunal. If EC is successful, a legally binding settlement would be signed by both parties and no claim would be brought.

Employment Tribunal fees

Current position

To date, claimants have not been required to pay a fee to bring an Employment Tribunal claim. The Government has, however, been concerned that this places a financial burden on the taxpayer.

Government proposals

To relieve this financial burden, the Government intends to implement Employment Tribunal fees, which will require users of the Employment Tribunals and Employment Appeal Tribunal to make a contribution to the cost of the service that they receive, where they can afford to do so.

The fees, which are expected to apply from summer 2013, are potentially payable at two different stages (on issue of the claim and prior to the hearing) and differ, depending on the type of claim:

- **Level 1 claims** – these are claims “generally for sums due on termination of employment e.g. unpaid wages, payment in lieu of notice, redundancy payments”. The issue fee will be £160; the hearing fee will be £230.

- **Level 2 claims** – these include those relating to unfair dismissal, discrimination, equal pay and whistleblowing. The issue fee for such claims will be £250; the hearing fee will be £950.

- **Multiple claims** – the issue fees and hearing fees will be higher, depending on the number of claimants in the multiple claim. For example, for Level 1 claims, the issue fee for 2-10 claimants will be £320 (twice the single fee).

- **Other fees** – other fees will apply to specific applications. For example, for an application for review in relation to a Level 1 claim, the fee would be £100.

- **Employment Appeal Tribunal** – the fee for an appeal is £400; the fee for the hearing is £1,200.

Many people on low incomes may not be required to pay the full fees, under the same remission system which already exists for court users who pay fees to use the civil courts’ services. The Government has also stated that it is committed to reviewing the fee structure once implemented to assess its impact in order to consider if changes are needed.

The new fee system, at least initially, is likely to reduce the number of Employment Tribunal claims and any reduction in vexatious claims will be particularly welcome. It is also likely to have an impact on any negotiations to settle claims. Although the new EC process, outlined above, is intended to resolve issues at an early stage, there may be an inclination to wait until an issue fee is paid to assess whether the potential claimant is serious about their claim.

Employment Tribunal rules

Current position

Creating an "efficient, effective and proportionate" Employment Tribunal system is a key part of the Government's ongoing review of employment law. The current Employment Tribunal rules are considered central to this.

At present, the Employment Tribunal rules are long, legalistic and often considered to be out of step with a forum where claimants in person and lay representatives are supposedly welcome. Following the 'Resolving Workplace Disputes' consultation, the stakeholder
feedback also indicated that the current Employment Tribunal rules had become over elaborate and could sometimes act as a barrier to effective case management. The Government therefore asked Mr Justice Underhill to lead a fundamental review of the Employment Tribunal rules. Following this review, the Government issued a consultation on the substance of his recommendations.

**Government proposals**

The new Employment Tribunal rules are expected to come into force in summer 2013. They are intended to be shorter, less complex and more accessible. The Government wants to ensure that the rules will be simplified and provide the framework to manage cases flexibly, efficiently, proportionately and where possible, consistently, providing certainty to all parties participating in the Employment Tribunal process.

The key proposals include the following:

- **Initial paper sift of cases and strike out powers** - The proposed new rules provide for an initial consideration of the claim form and the response by an Employment Judge. If the Judge considers either that the claim or the response has no reasonable prospect of success, the case can be struck out at an early stage. Alongside this early sift of cases, it is also proposed that a new stand alone rule will allow Judges to strike out a case at any point in proceedings when they decide it should not continue.

- **Combining case management discussions and pre-hearing reviews** - Case management issues (such as setting directions for a hearing) and substantive issues (such as whether a claim is in time) will, in future, be dealt with together at a "preliminary hearing". This change is intended to lead to the quicker disposal of cases and provide cost savings to all parties.

- **Timetabling of hearings** - Employment Tribunals will have a clear power to prevent over long and disproportionate oral evidence, questioning of witnesses and submissions, and this can be enforced by the judge or panel guillotining the session if required.

The changes to the Employment Tribunal rules are likely to have an impact on employers. The initial consideration of the file by a Judge should assist in weeding out weak claims and employers may find they will face less unmeritorious or vexatious claims. The timetabling of hearings is also significant. As there may be time limits during the hearing, employers will need to ensure that their case is prepared fully, so that the case presented to the Employment Tribunal in writing is as thorough as possible.

**Unfair dismissal compensation**

**Current position**

There has been a limit on compensation for unfair dismissal since the introduction of unfair dismissal rights in 1971. The compensatory award for unfair dismissal is currently capped at £74,200.

The Government, however, has had concerns that the current level of the cap may lead to unrealistic perceptions among both employees and employers about the level of tribunal awards. It was therefore keen to consider whether the current cap is set at an appropriate level to provide reasonable, but not excessive, compensation for unfair dismissal or whether the level of the cap should be decreased.

**Government proposals**

The Government confirmed in its response to the 'Ending the Employment Relationship' consultation that it intends to introduce a 12 months’ pay cap on the compensatory award for unfair dismissal. It will retain the overall cap on the compensatory award for unfair dismissal (as noted above, this is currently £74,200). This is due to come into force in summer 2013.

The Government believes that a pay based cap could strike a balance between ensuring that claimants are fairly compensated and giving the parties more realistic perceptions. It also believes it would lead to the earlier resolution of disputes.

The changes to the unfair dismissal compensatory award are expected to come into effect in summer 2013. The changes are welcomed by employers, as the revised cap may help manage employees’ expectations and assist with resolving workplace disputes.

However, there is a risk that the 12 months’ pay cap may lead to employers facing additional claims which attract potentially unlimited compensation, such as discrimination or whistleblowing.
Financial penalties

Current position

Although employers may be required to pay compensation if an individual is successful in bringing an Employment Tribunal claim, they are not required to pay any specific financial penalty. However, the ‘Resolving Workplace Disputes’ consultation set out the Government’s intention to introduce a power for Employment Tribunals to impose financial penalties on employers found to have breached an individual’s rights. The Government took the view that this would encourage employers to have greater regard to what is required of them in law and, ultimately, would lead to fewer workplace disputes and Employment Tribunal claims.

Government proposals

The ‘Resolving Workplace Disputes’ consultation proposed that Employment Tribunals would automatically levy a financial penalty on an employer who loses a claim (other than in exceptional circumstances). This would be in addition to the damages awarded to the claimant, but would be payable to the Exchequer. The Government's response to the consultation confirmed that it would introduce financial penalties but it would not be an automatic levy.

The key proposals, which are expected to come into force in spring 2014, are as follows:

- A penalty may be levied where the employer's breach has “one or more aggravating features” (i.e. penalties may be imposed where a Judge determines the breach involves unreasonable behaviour, for example where there has been negligence or malice involved).

- The financial penalty will be half the amount of the total award made by the Employment Tribunal, so that the level of financial penalty is proportionate to the award.

- There will be a minimum threshold of £100 and an upper ceiling of £5,000.

- As an incentive for any penalty to be paid quickly, the penalty will be reduced if there is prompt payment. This is set at a 50% reduction if the payment is made within 21 days.

- Employment Tribunals should have regard to an employer’s ability to pay when deciding whether to order the employer to pay a financial penalty.

Although many of the changes outlined in this briefing note are welcomed by employers, the Government’s proposal regarding financial penalties is understandably less popular. The prospect of having to pay financial penalties may lead employers to settle unmeritorious claims and, at present, it is not entirely clear what will constitute “aggravating features”.

Conclusion

Many of the above changes are expected to come into force during 2013. Employers should therefore monitor developments and be prepared for the changes.

The introduction of Employment Tribunal fees is perhaps the most important of the above developments, as paying an issue and/or hearing fee will represent a significant cost for many potential claimants. Whether or not a potential claimant is prepared to pay the appropriate fee is likely to have the most impact on how employers respond to disputes and handle Employment Tribunal litigation, given the management time and costs involved. It remains to be seen whether the Government's other proposals will have an equally significant impact on Employment Tribunal litigation.
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Contacts

Richard Kenyon
Partner
t: +44 020 7861 4001
e: richard.kenyon@ffw.com

David Gallagher
Partner
t: +44 020 7861 4349
e: david.gallagher@ffw.com

Margaret Davis
Partner
t: +44 020 7861 4187
e: margaret.davis@ffw.com

Michael Calvert
Partner
t: +44 020 7861 4220
e: michael.calvert@ffw.com

James Warren
Partner
t: +44 020 7861 4823
e: james.warren@ffw.com

Nicholas Thorpe
Partner
t: +44 (0)20 7861 4830
e: nicholas.thorpe@ffw.com

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