

Employment Tribunal Reform

28 January 2011

On 27 January, the UK Government published its proposals for resolving workplace disputes. These proposals are subject to consultation that ends on 20 April 2011, but, if implemented, will have a clear impact on employment practices in the UK.

These proposals form part of the government's review of employment law in the UK, with the stated aims of (i) removing barriers to employment; (ii) supporting and encouraging the resolution of disputes within the workplace and without recourse to the Employment Tribunal system; and (iii) where the employment relationship has broken down, bringing matters to a close in the quickest and least painful way. Where this involves recourse to an Employment Tribunal, measures have been proposed to try to contain costs incurred by employers in defending employment claims.

The most significant proposal is to double the qualifying period for unfair dismissal protection from its current level of 12 months' prior employment to 24 months.

The proposed increase in unfair dismissal qualifying service is intended to encourage recruitment by giving employers what the government refers to as "more time for the employment relationship to get established and work well." In reality, it means that employers will have a longer period in which they can dismiss employees without recourse to the Employment Tribunal system.

Other proposals include the following:

1. Requiring compulsory pre-claim conciliation through the government's Conciliation Service.
2. Requiring the employee to pay a filing fee on presenting an Employment Tribunal claim or appeal, and, in the event of a liability finding against an employer, requiring the employer to pay a compensation-related penalty to the Treasury.
3. Introducing measures allowing an Employment Tribunal more flexibility in its power to strike out unmeritorious claims; increasing the level of "deposit" that a Tribunal can require a claimant to pay where the claim appears to have little prospect of success; and increasing the level of costs that a Tribunal can award.

These measures are aimed both at encouraging the early resolution of workplace disputes, if at all possible whilst keeping the employment relationship intact, and at dissuading unmeritorious claims (or defences).

Whilst measures aimed at increasing recruitment and reducing the burden of employment regulation that employers currently bear will be welcomed by employers, it seems doubtful that the headline measure of increasing the unfair dismissal threshold will have as much of an impact as the government hopes. In our view, it will merely accelerate the trend of employees issuing other claims, such as discrimination and whistleblowing, for which there are no qualifying periods and where compensation (unlike unfair dismissal) is uncapped.

Pre-claim conciliation is intended to encourage the parties to resolve their dispute without resorting to litigation. This is similar to a previous regime which required employees to file a grievance before being allowed to file certain sorts of claims. The previous scheme had no noticeable impact on the number of claims and many employers found that it simply increased the costs and time spent in dealing with disputes.

Filing fees, however, and some form of additional financial penalty for the losing employer, coupled with enhanced powers to strike out, to order the payment of a deposit, and to award costs, may have more of an impact in encouraging early dispute resolution and in reducing the number of unmeritorious claims or defences within the Tribunal system.

Should the proposed increase in qualifying employment for unfair dismissal protection be implemented, employers will need to review their current processes which, for example, automatically flag an employee for review at least one month prior to their completion of 12 months' employment.

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