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labour and employment lawflash

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Important Changes to UK Employment Law Take Effect

New Employment Tribunal rules, new provisions on pre-termination negotiations, and changes to unfair dismissal compensatory awards apply from 29 July.

On 29 July, key changes to UK employment law came into force. These changes, which are summarised below, will have an impact on compromise agreements, pre-termination negotiations, Employment Tribunal procedure, and unfair dismissal claims.[1] They represent a key part of the coalition government's strategy to reduce the legislative burden on employers and have been implemented following a high-profile consultation process. The intention, amongst other things, is that these changes will make it easier for employers to have frank discussions with underperforming employees and will reduce the number of speculative and/or unmeritorious tribunal claims.

Compromise Agreements

Compromise agreements, which are binding waivers of statutory employment claims, will be renamed "settlement agreements". Although the name will change, settlement agreements will still need to comply with the same requirements as applied previously to be legally binding (e.g., an employee must receive advice from an independent adviser).

Additionally, the Advisory, Conciliation and Arbitration Service's (Acas's) Code of Practice on Settlement Agreements (the Code) recommends that, unless the parties agree otherwise, employees must be given a minimum period of 10 calendar days to consider the proposed terms of a settlement agreement and to obtain independent advice.

Pre-Termination Negotiations

A new statutory right will enable employers and employees to enter into negotiations with the aim of agreeing to terms for the termination of the employment relationship. The new law will allow the pre-termination negotiations to be treated as confidential, "protected" conversations and, therefore, not admissible as evidence in unfair dismissal proceedings. It applies to all negotiations that take place with the intention of terminating the employment relationship on agreed terms, including where there is no dispute between the parties. As such, this is an extension of the existing common law principle of "without prejudice"—which employers have previously sought to rely on to retain confidentiality over negotiations with their employees—as this principle only applies when there is a preexisting dispute.

However, the new law has certain limitations and is likely to be of limited practical assistance to employers in most cases for the following reasons:

- It does not apply where there has been "improper behaviour" from the party wishing to rely on it. The Code contains a nonexhaustive list that includes victimisation, harassment, physical assault, bullying, and discrimination as examples of improper behaviour.

1. For more information on the changes to the Employment Tribunal's procedures, see our 6 June 2013 LawFlash, "All Change in the UK Employment Tribunals", available at http://www.morganlewis.com/pubs/LEPG_LF_AllChangeUKEmploymentTribunal_06june13.

- It only applies to "ordinary" unfair dismissal claims, so it will not apply in cases where any resulting dismissal would be automatically unfair, such as whistleblowing or where an employee asserts that they have been subjected to unlawful discrimination.

Employment Tribunal Fees

Claimants will now be required to pay a fee when lodging an Employment Tribunal claim and another fee to have the claim proceed to a full hearing.

The following fees will apply:

- Type A claims (such as notice pay, unlawful deductions, equal pay, and redundancy pay) will cost £160 to lodge, with a £230 hearing fee.
- Type B claims (such as unfair dismissal and discrimination) will cost £250 to lodge, with a £950 hearing fee.

There are also application-specific fees, such as a £160 fee for a Type A counterclaim application.

A remissions system has been introduced in conjunction with the new fees. An individual may put in a remission application, and, depending on the individual's circumstances, the tribunal may waive the fees that would otherwise be due either in part or in full.

A potential consequence of the new fee structure is that claimants, particularly those with Type B claims of relatively limited value, may be more likely to engage in settlement negotiations at an earlier stage and in advance of the full hearing fee becoming due. Moreover, employers will no doubt seek to use the fact of an impending hearing fee as leverage in the negotiation process.

Employment Tribunal Rules

New rules will apply to all claims in Employment Tribunals (except counterclaims and notices of appeal) irrespective of whether the claims were raised before 29 July 2013. The rules are intended to increase the efficiency of the tribunal system by giving employment judges more power to manage cases.

The key changes made by the new rules include the following:

- Where appropriate, tribunals must encourage parties to use Acas, mediation, or other forms of dispute resolution to resolve disputes.
- Tribunals will reject any claim not accompanied by a fee or fee remission application.
- Tribunals will reject any claim that "cannot sensibly be responded to or is otherwise an abuse of process".
- There will be an initial sift stage for both claims and responses to decide whether they should be struck out and to decide what case management orders are necessary to get a case ready for a hearing.
- Tribunals may impose limits on the time that parties may take to present evidence, question witnesses, or make submissions.
- Case management discussions and pre-hearing reviews will be combined into new preliminary hearings.
- Claims that are withdrawn will automatically result in the claim being dismissed without a need for the parties to apply to the tribunal to request dismissal.
- Costs awards in excess of £20,000 may be made by employment judges rather than being referred to the Sheriff Court (Scotland) or the County Court (England and Wales).

Unfair Dismissal Compensatory Awards

The unfair dismissal compensatory award cap was previously set at £74,200. From 29 July, the cap will be the lesser of 12 months of an employee's pay or £74,200. The reduction in the cap for any employee earning less

than £74,200 per annum is intended to make a low-value settlement more attractive to such employees. However, there is a real risk that in practice this will encourage such employees to broaden their claims to encompass allegations such as whistleblowing or unlawful discrimination, which are not subject to any damages cap. Such claims tend to be more complex and far more expensive to defend, so this may ultimately result in employers being subjected to more, rather than less, cost.

Implications

These changes to UK employment law were intended to be employer friendly. It is hoped that the introduction of tribunal fees, coupled with the cap on compensatory awards, will encourage employees to evaluate the merits of claims before bringing them and will, to some extent, alleviate the burden on employers of having to defend frivolous claims. However, it remains to be seen how effective these changes will be in practice.

Contacts

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