

E-ALERT | Employment Law Briefing

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UK EMPLOYMENT TRIBUNAL REFORM

On 27 January 2011, the UK government published *Resolving Workplace Disputes: A Consultation* (the "Consultation") which proposes a number of wide-ranging reforms to the employment tribunal system. If implemented, the reforms may have a significant impact on employment practices in the UK. The Consultation closes on 20 April 2011.

We summarise below the government's key proposals. To access the Consultation paper please click [here](#).

RESOLVING WORKPLACE DISPUTES

The Confederation of British Industry ("CBI") estimates that between 1998 and 2009 employment regulation cost UK businesses more than £70bn. The coalition government intends to reduce this burden on UK employers and has commenced a review of employment law in the UK. The government's aim is to resolve more workplace disputes before they reach the employment tribunal system. Where tribunal proceedings are unavoidable, it wants to ensure that the process is as swift, user-friendly and effective as possible. The government is also keen to help businesses and social enterprises feel more confident about hiring employees.

SUMMARY OF MAIN PROPOSALS

1. Unfair Dismissal

The government proposes extending the unfair dismissal qualification period from one to two years. This extension of the statutory probationary period is likely to be welcomed by many employers. The government anticipates that it would result in 3,700 - 4,700 fewer unfair dismissal claims each year. However, it might mean employees with less than two years' service seek to bring other claims (discrimination or whistleblowing-related) in order to circumvent the restriction.

2. Early Conciliation

In an attempt to encourage early dispute resolution and avoid claims being escalated to the tribunal, the Consultation proposes compulsory pre-claim conciliation through the statutory body, the Advisory, Conciliation and Arbitration Service ("Acas"). This would allow Acas a period of up to one month to attempt to resolve a claim.

Acas would also provide advice and information concerning the likely value of awards and the average time involved in dealing with claims. This is intended to address media-fuelled misconceptions of large damages awards for employees and to help parties understand their true prospects of success.

Given the fact that reduction in public expenditure is a key factor in the proposed reforms, there is some concern that Acas would not receive the funding it needs to support such an expanded role.

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3. Fees and Penalties

According to a CBI survey, 45 per cent of employers felt that the number of weak and vexatious claims increased in 2010. In an attempt to incentivise earlier settlements and discourage unreasonable behaviour, such as "*pursuing weak or vexatious claims*", the government is proposing the introduction of:

- a requirement for employees to pay a filing fee when they submit a tribunal claim or appeal. The Consultation does not detail any concrete proposal for fee-charging; it intends to "*consult on how best to implement a fees mechanism*" later in the year;
- a financial penalty on an employer who loses a claim (subject to some exceptions) on top of the compensation awarded to the employee. The penalty would generally be 50 per cent of the compensation award, be payable to the Treasury and subject to a cap of £5,000. However, to encourage early payment, it would be reduced by half if paid within 21 days; and
- a financial penalty for failure to accept a reasonable offer of settlement. Where damages are awarded, the government envisages giving tribunals the power to make an uplift or reduction in compensation. Where no compensation is awarded, the claimant's failure to accept a reasonable offer could result in a costs award against the claimant.

4. Other Proposals

- **Provision of information:** The government suggests introducing a requirement whereby claimants are required to complete a preliminary Schedule of Loss (and possibly provide other mandatory information) with their claim form. It also proposes allowing an employer the right to request further information from a claimant before it submits its defence.
- **Cost awards:** The Consultation proposes increasing the level of costs that a tribunal can award from £10,000 to £20,000 (although a tribunal can only award costs in limited circumstances; for example, where the claim or defence was misconceived, or where a party acted vexatiously or unreasonably).
- **Tribunal powers:** The government recognises that tribunals' existing powers to deal with weak claims are somewhat limited. To address this, it proposes allowing tribunals more flexibility in their powers to strike out unmeritorious claims and make "*deposit orders*" where the claim has little prospect of success. The Consultation also proposes increasing the maximum level deposit order from £500 to £1,000.
- **Role of employment judges:** The Consultation proposes extending the circumstances in which employment judges can sit alone to include unfair dismissal claims. There is also a proposal to delegate routine interlocutory work (such as requests for further information, amendment of pleadings, postponements and listing) to "*suitably qualified legal officers*". The net result of these changes would be more judicial time adjudicating claims, and quicker decisions.
- **Witness statements:** In order to reduce the length of tribunal hearings, the government proposes that witness statements should stand as evidence in chief. Procedural safeguards would be introduced to give the tribunal discretion to vary this default rule. This proposal is intended to reduce the length and cost of tribunal hearings and also to streamline inconsistent practice (some tribunals already take witness statements as read, while others do not).
- **Witness expenses:** It is also proposed that witnesses should attend tribunal hearings at their own expense (e.g. travelling costs, loss of earnings etc) unless a witness order is made, in which case the party calling the witness would pay their reasonable expenses. This would better align tribunal practice with the practice adopted in other parts of the UK justice system, as well as reducing the number of witness called and, therefore, the length of hearings.

THE FUTURE?

The Consultation has been described as a "*political hot potato*" and has generated significant UK media coverage, albeit with a very mixed response. The Consultation closes on 20 April 2011; the government expects to release its response during Autumn 2011, with any legislation to follow later in 2012. It will be interesting to see whether the proposals survive without significant amendment. We will all be watching this space.

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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