Blake Lapthorn

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employment law news

Government response to consultation on ET reform

It's finally here: the Government's long-awaited response to consultation on the Employment Tribunal system. Is it, as ministers claim, the "most radical reform to the employment law system for decades"?

On 23 November, after many leaks and suggestions (**see last month's article**), the Government published its response to the consultation on Employment Tribunal reform.

what the Government will do

The main proposals the Government will take forward are set out below.

- requiring claimants to submit a simple claim form to ACAS initially, giving the opportunity for 'Early Conciliation' (EC). If one party does not wish to engage in it, or it is unsuccessful, an ET1 may be lodged within one month of the end of EC. EC will last up to one month, extendable by two weeks if ACAS believes there is a reasonable prospect of settlement and the parties agree. There will be increased resourcing for ACAS to achieve this, and ACAS may still conciliate, if beneficial, up to the hearing date
- developing the use of workplace mediation at an early stage well before disputes crystallise, through a large-scale pilot in the retail sector and support for mediation training
- supporting the use of compromise agreements (to be renamed "settlement agreements") by introducing a standard precedent which employers may make use of, considering changes to allow a blanket waiver of claims rather than listing each one, and amending the controversial **s147 of the Equality Act 2010**
- giving Employment Judges discretion to impose a financial penalty on an employer whose behaviour had "aggravating features" (citing examples such as negligence o malice). In such cases the penalty will be half of the total award (subject to a minimum of £100 and a maximum of £5,000), with a 50% reduction for payment within 21 days
- commissioning a fundamental review of ET rules of procedure, led by the outgoing President of the EAT, to include considering a revised ET1 with a Statement of Loss
- abolishing the use of lay ET members for unfair dismissal claims, unless the Employment Judge directs otherwise – despite 63% of those responding disagreeing with this. The EAT will also drop lay members in most cases
- increasing the limit on deposit orders from £500 to £1,000 and on costs awards from £10,000 to £20,000
- taking witness statements as read unless an Employment Judge decides otherwise, and removing the State funding of witness expenses
- rounding up redundancy payment and compensation limits to the nearest £1 instead of the nearest £10 and nearest £100 (which could represent a significant saving for employers).

The Government has confirmed that it will consult in the New Year on a system of 'protected conversations' which would enable the employer and employee to engage in frank discussions even where there is no existing dispute – though it has been clarified that this will not protect against claims for discrimination arising from such conversations. It is proposing two options for a system of Tribunal fees which will be consulted on shortly, and it will also consult on the concept of "Rapid Resolution" where low value, straightforward claims could be determined more quickly without a hearing and without an Employment Judge.

Those changes which do not require an Act of Parliament or further consultation are to be brought into force in April 2012.

our analysis of the consultation response

Blake Lapthorn responded to the consultation (**see our response here**) and we are pleased to see that Early Conciliation will be optional not compulsory, so that in cases where neither party intends to participate, the process should not be unduly delayed (although there is certainly scope for abuse). However, we are disappointed that there will be a separate, simpler form than the ET1 for the claimant to complete and submit to ACAS for the purpose of Early Conciliation, with apparently no equivalent response from the employer. Having even less information at such an early stage undermines the efficacy of conciliation, and could lead to another failed 'tick box' procedure such as the old statutory dismissal and grievance procedures. The Government have, at least, taken on board the concern expressed by us and many others that ACAS will not be properly

resourced to deal with EC. Nevertheless, its assumption that this can be funded from a resulting reduced workload for ETs seems somewhat optimistic. We are pleased that ACAS will continue its (in our view more valuable) role of conciliating further down the line when the parties come to assess their own and the other party's case more realistically.

The Government's intervention on the current uncertainty of compromise agreements under the Equality Act 2010 is to be welcomed, despite the Government still asserting that the problem is more apparent than real. Tidying up some technical drafting issues will also be helpful, but the proposed precedent compromise agreement is likely to be a recipe for disaster if businesses take matters into their own hands on such a potentially complex area. If the agreement turns out to be unenforceable, the employer is likely to be left without a remedy. We believe there are a number of question marks surrounding these proposals for compromise agreements, particularly since compromise agreements have, since their inception, been an effective tool that generally already work well.

We very much regret the fact that lay members of the ET will no longer be used in unfair dismissal cases, a view which appears to be held by the majority (63%) of those who responded to the consultation. In our view it is potentially the thin end of the wedge for the use of lay members in all types of claim. The balanced view given by the three-member panel has for many years given the ET system substantial integrity in the eyes of its users. The underlying reason for going ahead with this proposal can only relate t saving cost.

In relation to the proposed financial penalties for employers who lose an ET claim, we and others pointed out that this does not take account of the many good employers who lose cases and argued this was substantially unjust, bearing in mind very few employers deliberately seek to deprive employees of their rights. Fortunately, the Government took note, and a penalty will not be imposed for all lost cases; Employment Judges will have a discretion to impose a penalty where an employer's behaviour involves an aggravating feature. Although we are disappointed that the level of financial penalty will continue to be based on the award (which in turn is mostly based on loss of earnings rather than the employer's culpability) it is to be hoped - but not assumed - that such penalties will be relatively rare.

other developments in the pipeline

Further announcements made alongside the consultation response are that the Government will:

- call for evidence on reducing the 90 day consultation period for collective redundancies to 60, 45 or 30 days, and on simplifying TUPE
- consult on the **controversial concept of no-fault compensated dismissal** – but only for businesses of 10 employees or less
- close down a 'loophole' which currently allows employees making disclosures about an employer's breach of their employment contract to be classed as whistleblowers
- potentially revising the ACAS Code of Practice on Disciplinary and Grievance Procedures to achieve a "simpler, quicker and clearer dismissal process"
- create a CRB check that is portable between jobs and can be viewed online from early 2013.

In our view this is far from being the most 'radical' reform for decades. Those who have been involved in employment law for a number of years may well recall the many failed reforms in this field, some of which, like the statutory disciplinary and grievance procedures, had a far deeper impact on workplace disputes. What might perhaps prove more radical are the concepts, still only in their infancy, such as **'compensated no fault dismissal'** for micro businesses. In the meantime, it is clear is that the way these current reforms are introduced – particularly the way legislation is drafted – will be vital to making any changes cost effective in the long run. In many ways, the Government's work has only just begun.

For further information on any of the issues covered in the above publication, you can contact a member of our **Employment law** team based in **Southampton**, **Oxford** and **London** or alternatively email us at **employmentinfo@bllaw.co.uk**.

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