

# Employment eNews: January 2012

## Happy new year to you all!

2012 - The year of the Olympics and Para-Olympics. Whilst aspiring athletes are doing their hard graft at training camps in warmer climes, the chilly winds of Government announcements are occupying the minds of employment lawyers and HR professionals alike.

At the back end of 2011 the Government published or announced a number of employment related responses/proposals which we comment on below.

In light of these responses and proposals it is worth remembering that this year will be a marathon not a sprint although for some it may feel more like a 400meter hurdles event – it will go quickly but it will require stamina and there will be obstacles along the way!

## Government response to consultation on employment tribunal reform

In January 2011, the Department for Business Innovation and Skills (BIS) launched a Resolving Workplace Disputes consultation covering wide-ranging reforms to the employment tribunal system. The primary aims of the consultation were to achieve more early resolution of disputes without the need for tribunals, a "swift, user-friendly and effective" tribunal system, and to help businesses "feel more confident about hiring people".

The consultation closed in April 2011 and BIS published its response on 23 November 2011, on the same day that it announced a host of other reforms in employment law (see below). The outcomes of the consultation are as follows:

### Mediation

The Government will undertake a "long term reform programme" to increase the use of mediation to resolve disputes. It proposes to work with the private sector to share knowledge of mediation with smaller businesses. It will:

- Undertake a pilot, to run in the retail sector (which has already invested in in-house mediation services), to explore how retailers can share their expertise with smaller employers in their supply chain.
- Fund a mediation training scheme, to create networks of mediators that could provide low-cost mediation to other organisations in their network. This will be developed as a regional pilot at first.

### Compromise agreements

The Government will:

- Consult on whether and how to enable compromise agreements to cover all existing and future claims without the need for a full list of causes of action.
- Consult on "protected conversations" (see below).
- Consider how to draft a standard text and guidance for parties to use.
- Review the advice and guidance on compromise agreements available to employers and employees.
- Consider changing the title of "compromise agreement" to "settlement agreement".

## **Early conciliation**

The Government will introduce the following measures:

- Claimants will be required to submit details of their claim to Acas at first, at which point they will be offered the option of early conciliation. If it is refused by either party, or is unsuccessful, the claimant will be able to make their tribunal claim. The period for early conciliation will end after one month.
- Claimants will have a period of one month in which to submit their tribunal claim following the completion of early conciliation. This will "stop the clock" on tribunal limitation periods where early conciliation is entered close to the end of that limitation period.
- Parties in all claims will be offered early conciliation, apart from where statutory time limits preclude it.
- Early conciliation will be offered in multiple claims, regardless of the size of the group.
- Acas conciliators will be able to extend the conciliation period by a further two weeks where there is a reasonable prospect of settlement and with the parties' agreement.
- Acas will now have a **duty** to conciliate pre-claim, rather than a power.
- A simple form will be introduced to be used in the process.
- Acas will be provided with greater resources, funded by the savings that the Exchequer is expected to make as a result of a fewer claims reaching the tribunal.

## **Modernising tribunals**

This section of the consultation response deals with issues arising from the tribunal process. Following the responses received, the Government has invited Mr Justice Underhill to undertake a Fundamental Review of Employment Tribunal Rules which is due by April 2012. In the meantime, the Government has decided upon a number of matters including:

### ***Case management***

- The limit for deposit orders will be increased from £500 to £1,000.
- The limit for costs awards will be increased from £10,000 to £20,000.

### ***Witness statements being taken as read***

Witness statements will be taken as read unless a judge or tribunal directs otherwise.

### ***Judges sitting alone***

Unfair dismissal cases in the tribunal will now be heard by a judge sitting alone, unless they direct otherwise. Progress on this change will be reviewed in one year's time. Less controversially, EAT judges will now always sit alone unless they direct otherwise.

### ***Unfair dismissal***

As previously announced, the unfair dismissal qualifying period for all businesses will increase to two years, probably from April 2012.

### ***Financial penalties for employers***

Financial penalties against employers may be introduced. These penalties will be levied against an employer who loses a tribunal claim and will be in addition to the damages awarded to the claimant. The penalty will be half of the total award made by the tribunal, with a minimum threshold of £100 and a maximum ceiling of £5,000. Where a non-financial award is made, the tribunal can ascribe a monetary value. The penalty will be reduced by 50% if paid within 21 days. However, the levy of a

financial penalty will **not** be automatic, and will instead be at the tribunal's discretion. An employer can appeal against the imposition of a financial penalty.

### ***Rapid Resolution scheme***

The Government will launch a consultation on introducing a "Rapid Resolution" scheme to provide swifter and cheaper determinations in low-value, straightforward claims. This could involve non-judicial determination based only on papers, thereby avoiding the need to engage judges and a full oral hearing.

## **Government proposals for employment law reform**

In addition to the tribunal reforms detailed above, Vince Cable announced in November 2011 a variety of other possible employment law reforms. Many of these proposals have resulted from the 'Red Tape Challenge' and consultation will be carried out, where necessary, before any final decisions are made;

- Introducing "protected conversations" to allow employers to raise workplace issues "in an open way, free from the worry it will be used as evidence in... tribunal".
- Different fees for different types of tribunal claims, possibly with a higher fee for higher value claims. A consultation on fees has been published and will close on 6 March 2012 – details can be found on the Ministry of Justice website.
- "Closing the loophole" in whistleblowing law whereby a complaint about a breach of the employment contract can count as a qualifying disclosure.
- Improving CRB checks by making them instantly accessible online (from 2013).
- "Simplifying and streamlining" the UK's recruitment sector by addressing unnecessarily complex rules on employment businesses and agencies (consultation will start in Spring 2012).
- Reviewing the Agency Workers Regulations 2010 in 18 months' time.
- Simplifying the 17 pieces of National Minimum Wage legislation into one set of regulations.
- Responding to Dame Carol Black's 2011 review of sickness absence.
- Extending the right to request flexible working to everyone.
- Introducing a more modern system of parental leave that reflects the greater involvement of fathers in childcare.

Watch this space for further updates.

## **A call for evidence in relation to the effectiveness of TUPE**

Following concerns from businesses that TUPE 2006 unnecessarily "gold-plates" the European Acquired Rights Directive (from which TUPE originates) and is "overly bureaucratic", the Government announced that it would review TUPE 2006 as part of the wider review of employment law. BIS has issued a call for evidence prior to the review. The focus is on whether TUPE 2006 could be improved or whether improved guidance and best practice examples could better address the issue.

The Government is seeking views on matters such as:

- whether the increased certainty about the application of the regulations to service provision changes has resulted in benefits or burdens for businesses;
- whether the legislation should be changed to specify which insolvency proceedings fall under which provisions or whether more detailed guidance would be sufficient;
- allowing for post-transfer harmonisation while remaining compliant with the Acquired Rights Directive.

The closing date for answers is 31 January 2012. If the balance of evidence calls for possible changes to TUPE 2006, there will be a formal consultation on any proposed changes in 2012.

## **A call for evidence in relation to collective redundancy consultation**

Under section 188 of Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), where an employer proposes to make large scale redundancies of 20 or more employees within a period of 90 days or less, it must consult on its proposal with representatives of the affected employees and also notify BIS. In May 2011, the Government announced that as part of its review of employment law it would review collective redundancy consultation periods. The Government is particularly keen to review the 90-day period on the basis that it is too long and hinders employers' ability to restructure their businesses.

The Government plans to explore the consequences of reducing the 90-day period to 60, 45 or even 30 days. Any evidence gathered will be used to formulate policy proposals that will be put forward for formal public consultation in 2012. The Government is keen to establish the impact of the collective redundancy rules on business confidence and the flexibility to respond effectively and appropriately to market opportunity and challenges.

In particular the Government is keen to understand the following:

- what factors make it easier or more difficult to reach agreement and conclude a consultation;
- the advantages and disadvantages of a statutory 90-day minimum time period before dismissals can take effect;
- what effect minimum consultation periods have on redundancies which have a significant impact on a particular region or sector. It may be appropriate to have a shorter or longer consultation process, so the Government is calling for evidence on the advantages and disadvantages of the 90-day period in this particular context;
- issues which employers might have on how TUPE and the collective consultation rules fit together.

The closing date for answers is 31 January 2012. If the balance of evidence calls for possible changes to TUPE 2006, there will be a formal consultation on any proposed changes in 2012.

## **Proposals for simplified personal taxation**

In November 2011 the Government published a paper outlining its plans for reform to income tax and NICs by closer alignment of the two. The current system has been in place for over 60 years and the Government believes that a new system should be introduced that is more in tune with a labour market where multiple employments, part-time working, employment and self-employment and greater international mobility are common.

The Government intends to work with stakeholders over the next few months with a view to identifying high-level options for reform by the time of the 2012 Budget. A discussion document has also been published which sets out ideas for simplifying the administration of personal taxes, by making tax information more accessible to taxpayers. Further details can be found at [www.hmrc.gov.uk](http://www.hmrc.gov.uk)

## **New Tribunal Award Limits**

Finally, the annual increase in tribunal award limits will come into force on 1 February 2012. The headline rates are:

- a week's pay will increase from £400 to £430;
- the unfair dismissal compensatory award limit will rise from £68,800 to £73,200.

For further information, help or advice please contact **Tim Davies** on **0191 211 7927**, email [advice@muckle-llp.com](mailto:advice@muckle-llp.com) or contact any one of our Employment Services Group on **0191 211 7777**.