Legal Briefing on the main changes to employment law 2012/2013

In 2011 the Government announced its plans for the 'most radical reform to the employment law system for decades'. The Business Secretary Vince Cable described the changes, which include increasing the unfair dismissal qualifying periods, introduction of tribunal fees for claimants, reducing collective consultation periods and reducing employee protection under TUPE, as 'emphatically not an attempt to give businesses an easy ride at the expense of their staff'. A number of changes were then speedily implemented in 2012 following very short periods of consultation and arguably not taking proper account of the consultation responses received. A number of further changes are due to be brought into effect this year and some next year. Some are contained within the Enterprise and Regulatory Reform Bill, which is currently being considered by the House of Lords.

2012 changes

1) Increase in unfair dismissal qualifying period

The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 increased the unfair dismissal qualifying period and the qualifying period to receive written reasons for dismissal from one year to two years. This change will only affect new joiners who were employed on or after 6 April 2012.

This change will deny employment protection against unfair dismissal to about 2,000 employees per annum. According to the Government Impact Assessment, the greatest impact will be upon young black men.

At least part of the impetus for this change was the Government's view that there was a need to reduce the number of tribunal claims and that too many employee rights inhibit growth in the economy. In fact, and as many respondents to the Government consultation on this change pointed out, it is likely that this change will increase the number of automatically unfair dismissal, whistleblowing and discrimination claims being pursued as unfairly treated employees will be forced to try and shoehorn their complaints into other types of claims. Whistleblowing and discrimination claims in particular often result in far lengthier and complex tribunal hearings than unfair dismissal claims, therefore it is likely that Government thinking is flawed in its view that this change will reduce the number of tribunal claims and the pressure on the tribunal system itself. For both employers and employees, pursuing/defending more complex discrimination or whistleblowing claims will be more costly and more time-consuming.

2) Employment judges hearing unfair dismissal cases alone and witness statements being taken as read

These changes were also introduced in 2012, again with the intention of reducing the strain upon tribunal resources. Employment Judges will hear unfair dismissal cases alone, without wing members. Although parties can request that a claim be heard before a full panel, this is at the Employment Judge's discretion. A valuable contribution from wing members who have a wealth of industrial experience which is often entirely suited to deliberating upon the types of issues that arise in unfair dismissal claims is thereby lost.

Witness statements are now to be taken as read in employment tribunals unless an Employment Judge directs otherwise.

3) Increase in level of deposit orders and maximum limit of costs awards and removal of automatic payment of witness expenses

When a tribunal considers that a claim has limited prospects of success, it can order the claimant to pay a deposit to the tribunal as a condition of continuing with their claim. The maximum amount of a deposit order that a tribunal can require the claimant to pay has increased from £500 to £1,000.

Other side's costs are not usually paid by a losing party in the employment tribunal. However, they may be awarded in the employment tribunal against a party if that party or their representative has acted vexatiously, abusively, disruptively or otherwise unreasonably, or where the bringing or conducting of proceedings has been misconceived. The maximum limit for costs awards that a tribunal can make has been increased from £10,000 to £20,000.

Until recently, witnesses who attended an employment tribunal could claim a certain amount of their travel, overnight and loss of earnings expenses. The automatic right to these has now been removed. It was already extremely difficult to persuade individuals, who were often still working for the employer against whom a claim was being pursued, to attend a tribunal hearing as witnesses for a claimant. Knowing that they will probably be out of pocket if they attend makes this task even harder.

March 2013 changes

4) Increase in parental leave and extension to agency workers of right to request variation of contract following parental leave

Parental leave, which is unpaid in the UK, was increased in March 2013 from 13 weeks to 18 weeks. Parental leave must be taken in the first 5 years of a child's life (or within first five years of a child's placement if they are adopted, or at any time up to the child's 18th birthday if they are disabled).

Agency workers may now request a variation of their contract following a period of parental leave.

Take-up rates of parental leave are known to be far higher in countries (in particular in Scandinavia) where the entitlement is to paid leave.

6 April 2013 changes

5) Reduction in minimum length of redundancy consultation period

The minimum length of consultation that an employer is required to enter into when proposing to make 100 or more employees redundant has been halved from 90 days to 45 days. This will have a significant and extremely detrimental effect upon union ability to influence employer proposals given the shortness of time within which consultation will take place. Where an employer is proposing to dismiss between 20 and 99 employees the minimum consultation period remains at 30 days.

6) Removal of consultation requirements in respect of fixed-term employees whose contracts are coming to an end

Where fixed-term employees' contracts 'have reached their agreed termination point' at the time of the redundancies being made, these employees do not need to be consulted about the redundancies and will not count for the purposes of calculating how many employees the employer is proposing to make redundant. This will have a significant effect upon staff on term-time contracts, eg academic staff and reverses a recent UCU case (*Stirling v UCU*).

Summer 2013 changes

7) Changes to employment tribunal rules

On 23 November 2011, the Government announced that Mr Justice Underhill, the outgoing President of the EAT, had been tasked with reviewing the employment tribunal procedural rules. His terms of reference were to ensure "that robust case management powers can be applied flexibly, effectively and (insofar as is practicable) consistently." The four key aims of the review were to ensure that:

a) Cases can be managed in a way that is proportionate to the nature of the issues involved, with the importance of saving expense considered throughout;
b) Proceedings can be handled quickly and efficiently, with an emphasis on helping to resolve otherwise than through judicial determination, and dealing robustly with cases where they appear to have little or no reasonable prospect of success;
c) Rules are both simple and simply expressed; and
d) Proceedings have as much certainty as the nature of particular cases allows, and that in particular, like cases are treated alike, with as much use made of standardised orders and directions as possible.

On 29 June 2012, Mr Justice Underhill published a letter setting out his recommendations and draft new tribunal rules. These were welcomed by the Government which consulted in November 2012 upon a number of the recommendations. In the main, the proposals take a more 'front-loaded' approach to case management, giving tribunals the opportunity to reject claims that are not properly presented and introducing an initial 'sift' stage.

The main changes are as follows:

i) Tribunals will have new powers to sift claims at an early stage following consideration by an Employment Judge on the papers to consider what directions are required, and/or whether the claim or any part of it should be struck out;

ii) Preliminary hearings will be refined to combine both pre hearing reviews and case management discussions;

iii) Tribunals will have powers to limit oral evidence and submissions. In theory, this should lead to fewer costs awards and more efficient timetabling of cases;

iv) The rules for withdrawing claims will be clarified. This should be of assistance as it should simplify the process for withdrawal;

v) There will be new rules to deal with lead cases where there are multiple claims. This is a change that Unison argued for and were involved in the drafting of and it should make the management of multiple claims, eg equal pay claims, much more efficient;

vi) There will be a requirement to cooperate with alternative dispute resolution mechanisms, which may be of use where employers fail to cooperate with ACAS;

vii) There will be measures to encourage the prompt payment of tribunal awards. This is a welcome change as high numbers (at least 39% according to Government research in 2009) of tribunal awards are never paid by respondents;

viii) There will be presidential guidance for all employment tribunal regions, thereby reducing the inconsistent practices that currently exist between regions.

8) Introduction of fees in employment tribunals (including remission system)

There was widespread opposition to the introduction of fees itself, with concerns being raised about access to justice, claimants being penalised and those with genuine complaints being prevented from seeking legal redress. Despite this, the Government is pressing ahead with these changes, apparently to make the system more self-sufficient and to reduce the bill to the taxpayer. The Government consulted about how (not whether) to introduce fees in employment tribunals in December 2012 and were also meant to publish remission proposals at this time. There will be two 'levels' of claims. For level one claims which are generally for sums due on termination such as unpaid wages, pay in lieu of notice and redundancy pay, the issue fee will be £160 and the hearing fee will be £230. For level two claims (which are all other claims), the issue fee will be £250 and the hearing fee will be £950.

Subject to the remission system which enables claimants who cannot afford to pay a fee to pursue their claim (further information about which is set out below), fees will be payable in all cases without exception, and there will be no refund of fees even if a claim settles immediately after issue. There is no automatic entitlement to repayment of the fee to the claimant if their claim is successful, there is only a discretion for the tribunal to make the respondent reimburse the claimant for the amount of fees paid. Given that 39% of tribunal

awards are not paid at all and a further 8% are only paid in part, many claimants will be completely dissuaded from pursuing tribunal claims. It has been said that 'fees don't discourage unmeritorious claimants, they discourage impecunious ones'. There is also concern that the introduction of fees may make claimants more reluctant to settle claims and may be an obstacle in negotiations.

The proposals for multiple claims are incoherent, and it is understood that the software for managing the fees system is still in development stage despite the impending implementation date. Remission arrangements have similarly not yet been developed, and therefore the Government proposes to use the current civil courts remission system. This provides three gateways via which a claimant may access the remission system :

- That the claimant is in receipt of an income-related benefit from a prescribed list of income-related benefits;
- That the claimant's gross income is £13,000 or less if single or £18,000 or less if in a couple;
- That the claimant satisfies a means test based on their income and expenditure that is calculated on the legal aid means criteria. If a claimant's disposable income is below £50 per month, then they will be entitled to full remission. Partial satisfaction of this test can result in a partial remission – every extra £10 of disposable income makes the claimant liable for a fee of £5.

The Government has accepted that claims will be treated as lodged in time if accompanied by a fee or an application for remission even if the application is not processed until later or it is decided that the claimant does not qualify, which will hopefully avoid uncertainty as to whether or not a claim has been lodged in time.

A report by PWC in 2008 identified that civil court staff did not understand the remission system and that there was a high error rate. This is of great concern, especially given that no action has been taken to address these problems before extending the scheme to the employment tribunals.

9) Settlement conversations

Employers will be able to have conversations with and/or make offers to their employees pre-termination about their employment coming to an end on agreed terms without such conversations or offers being taken into account by an employment tribunal in any subsequent ordinary unfair dismissal claim (save in limited, and currently unclear, circumstances). The Government's apparent thought process behind this change is that it will enable an employer to raise concerns with an employee and suggest terms for ending the relationship, confident in the knowledge that the employee would not later be able to rely in an unfair dismissal claim upon any such discussions/offer as evidence that the employer was planning to dismiss in any event.

There are a number of worrying features connected to this change. In the first instance, the change makes no provision for a union representative to be informed or consulted. There is therefore increased potential for employees to be bullied into accepting settlements without the assistance, advice and guidance of their union. The proposal also chips away at the

foundations of the ACAS disciplinary code, as it will be quicker and cheaper for employers to make offers of termination in accordance with this proposal than to undergo proper, fair procedures.

It is to be noted that this change is a scaled-back version of the Government's original proposal, which was to introduce 'protected conversations', which would have allowed employers to discuss a wide range of management and workforce planning issues including retirement and poor performance.

10) Restrictions to whistleblowing claims

Changes to the whistleblowing legislation are also proposed. Disclosures will no longer be protected unless they are in the public interest, and there will be a removal of the provision requiring disclosures to be made in good faith (although an individual's compensation will be reduced if a disclosure has not been made in good faith in the event that their claim is successful). The reason behind this change is to seek to avoid individuals successfully arguing before the courts that a breach of their individual contract of employment is a qualifying disclosure.

A further change will be that tribunals may hold vicariously liable those employers who fail to take reasonable steps to protect employees from being subjected to a detriment by a co-worker for having made a protected disclosure.

11) Settlement agreements

Compromise agreements will be renamed settlement agreements, and the Government intends, in consultation with ACAS, to produce draft letters, a model template agreement, and guidance for employers about how to use the agreement, which will be contained in a statutory Code of Practice. The Government envisages that this Code will set out certain principles, including that either party can propose settlement, that the reason that settlement is being offered should be made clear, that any settlement offers should be made in writing and set out clearly what is being offered (eg financial settlement, reference etc), and that if the employer handles the negotiation poorly, ie fails to follow the Code, it may breach the implied term of trust and confidence enabling the employee to resign and claim constructive dismissal.

There may well be satellite litigation as a result of this change, to consider whether or not an employer has complied with the statutory Code. There are also concerns about whether one template agreement will suit the needs and individual circumstances of a whole range of different employers/employees.

12) Powers for ministers to amend the statutory cap on compensatory award in unfair dismissal claims

There will be powers for ministers to make regulations amending (either increasing or decreasing) the cap on compensatory awards in unfair dismissal claims. The current cap is £74,200, but the Government has announced that it proposes to use the power to make regulations reducing the maximum award to the lower of:

a) National median average earnings (about £25,882); or
b) An individual's net annual salary, but capped at between 1 and 3 times median earnings (the exact figure for median earnings is not clear).

The Government's justification for this extreme reduction in the level of compensatory award is that there was a huge increase in the compensatory award when it was increased to £50,000 back in 2000 and above-inflation rises since that time. However, what this fails to take into consideration is that the increase in 2000 was intended to link the compensation level back to the rate that it had been in 1971, adjusted for inflation. In addition, all annual increases to the award have been inflation-linked to the nearest £10, and therefore any above-inflation rise is marginal (and in fact, the level of the award dropped by £900 in 2010).

This change will make it easier and more attractive for employers to treat employees unfairly and without following proper process as their financial exposure will be far more limited than currently in the event that a successful unfair dismissal claim is pursued against them.

Autumn 2013 changes

13) Employee shareholder or employee owner status

On 8 October 2012, George Osborne announced at the Tory Party Conference, without any prior consultation, proposals for a new class of employee ownership arrangement. In return for receiving shares in the business of their employer to the value of not less than £2,000 (and so becoming an 'employee shareholder'), the employee would give up certain employment rights. The rights that would be forfeited are:

a) The right to be protected against unfair dismissal (excluding automatically unfair dismissal/discriminatory dismissals);
b) The right to a statutory redundancy payment;
c) The right to request time off for training (where that right currently applies);
d) The right to request flexible working (save upon return from parental leave);
e) The right to be protected against automatically unfair dismissal for requesting flexible working (save for on return from parental leave) or for requesting time off for training;
f) An individual under this scheme will need to give 16 weeks' (rather than 8 weeks') notice of an intention to return to work early from maternity/adoption/additional paternity leave.

It is to be noted that this proposal has received criticism from all quarters, including the CBI. The Government has ignored this, stating that this change is primarily intended for start-ups wanting to attract staff with the promise of good returns on shares. This does not take account of the fact that individuals may not wish to accept employment on these terms (shares in start-ups are usually of nil value), and that start-ups themselves may not be prepared to enter into such agreements, given the administrative burdens involved and the

fact that employees will not have an entitlement to a redundancy payment nor will they have unfair dismissal protection for 2 years from their start date in any event.

More worryingly, however, there is also a risk of this creating an underclass of employees with extremely limited employment protections and rights, if employers seek only to recruit new staff on an employee shareholder basis. This could impact significantly upon employee relations, and there may also be differences in how employers seek to conduct large-scale redundancy exercises and variations to contracts given that some employees may be precluded from bringing unfair dismissal claims/claims for redundancy payments.

There is also a suggestion that rejecting a job offer because it is being made on the above terms may affect an individual's entitlement to jobseeker's allowance – which makes this change even more unattractive and concerning.

There is a risk of huge loss of revenue to the Exchequer as these share schemes could be used to reduce an individual's liability to income tax and capital gains tax. Current estimates are that there may be a loss of up to £1billion.

Although the Government has announced that it will issue guidance both for employees about the personal consequences of employee shareholder status and for businesses so that they can understand how the different types of employment status will operate, a further concern about this change is that the administration involved is complex and requires access to specialist legal advice, which is obviously costly and not widely available.

14) Amendments to TUPE

On 17 January 2013 the Government announced a consultation on amending TUPE. The proposals are to:

a) most significantly, repeal the provision which includes most types of service provision changes within TUPE. TUPE was amended in 2006 to bring outsourcing, insourcing and retendering within its scope, but this proposal reverses this change;
b) limit the future applicability of terms and conditions derived from collective agreements to one year from the date of the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that the change was overall no less favourable to the employee;
c) repeal the specific requirement on notifying employee liability information in favour of a more general obligation limited to necessary information;
d) change the wording on restricting changes to contracts to allow variations in a wider range of situations following a TUPE transfer;
e) change the wording on protection against dismissal so that protections are narrowed;
f) change the wording on substantial change in working conditions to material detriment of employees;
g) amend the meaning of 'entailing changes in the workforce' so that it covers changes in location of workforce. There is currently no statutory definition of this phrase, but UK courts have usually interpreted it to mean changes in numbers employed or functions performed by employees. This proposal would mean that dismissals arising from a change in workplace following a transfer would not be automatically unfair;

h) ensure TUPE consultation by a transferee counts for the purposes of collective redundancies;
i) allow micro-businesses (those with fewer than ten employees) to consult employees directly rather than through elected representatives where there is no recognised union or existing representatives.

These changes reverse the previous Labour Government's welcome and helpful changes of 2006, and the removal of protection from service provision changes will have an extremely detrimental and widespread effect on our members, given the frequency with which we see outsourcing, insourcing, and transfers of second generation contracts contracts consisting primarily of labour.

April 2014 changes

15) Compulsory pre-claim conciliation by ACAS for all tribunal claims

There will be compulsory pre-claim conciliation by ACAS for all employment tribunal claims. This will fundamentally change the role of ACAS, who will effectively become the gatekeeper of the tribunal system. There are some genuine concerns about how multiple claims will be processed and how the pre-claim conciliation process will apply to multiple claims. Discussions are ongoing with BIS, the TUC and ACAS where we and the TUC are seeking to have certain claims, eg equal pay, excluded from the scope of pre-claim compulsory conciliation. There are also concerns about the fact that BIS is currently refusing to allow representatives to be named on the form, although we are attempting to lobby them about this. A further concern about this change is that, although there will be provision for the time for lodging a claim to be extended where pre-concilation is ongoing, the provisions concerning time extension are complex which may well lead to satellite litigation and additional disputes.

16) Employer penalties

Tribunals will have powers to order employers to pay penalties of at least £100 and up to £5,000 where there are 'aggravating features', with the penalty reduced by half if paid within 21 days. The penalty would be payable to central funds rather than to the claimant.

There are two main issues about this change – first, tribunals may be cautious and slightly hesitant in awarding these penalties, and secondly, there is no definition of 'aggravating features'. This means that any definition will only be gradually cultivated via developing case-law, which will probably take many years to clarify/refine.

Other changes with unknown implementation date

17) Exclusion of wing members from EAT hearings

This change follows a similar line to that being followed in the employment tribunal, and raises similar concerns about the loss of a wealth of industrial experience.

18) New non-statutory ACAS guidance on good quality consultation

New guidance will be produced (although nothing has yet been produced) setting out guidelines on the principles and behaviours behind good quality consultation. There has been some stakeholder involvement in discussions about this guidance.

19) Introduction of fees in the EAT

It will cost £400 to lodge an appeal, and, if the appeal is allowed to proceed, a further fee of £1,200 will be payable. Just over 2,000 appeals were received by the EAT in 2010/11 but only 600 were allowed to proceed to hearing. On these figures, the Government will raise over £500,000 from cases which will not go to a hearing.

20) Repeal of certain provisions in the Equality Act 2010

The Government consulted about repealing the third party harassment provisions and the questionnaire procedure in the 2010 Act between May and August 2012. 71% of respondents to the consultation actively opposed the abolition of the third party harassment provisions, and 83% were opposed to the abolition of discrimination questionnaires. The Government's response to this was to press ahead with the reforms anyway, apparently on the basis that the responses on third party harassment reforms did not provide 'substantial evidence' to retain the provisions, and that discrimination questionnaires are 'prescriptive and potentially threatening' to employers and encouraged 'undesirable micro-management of the process by Government'. As a result, the Government Equalities Office announced in October 2012 that they would repeal both of these provisions, as well as the employment tribunal's power to make wider recommendations in discrimination claims.

The abolition of the questionnaire procedure will limit a claimant's ability to test the strength of a case before proceedings are started, and may also lead to an increase in applications to tribunals for orders and directions where claimants will be forced to seek the information that they would have obtained from questionnaires in other ways.

It is likely that third party harassment claims can be recast either as detrimental treatment because of a protected characteristic under section 39(2) of the 2010 Act, or as unwanted conduct by the employer related to a protected characteristic under section 26 of the 2010 Act, therefore some recourse for employees who have suffered this type of harassment will still be available, however such claims will be far less straightforward to pursue.

18 April 2013