EMPLOYMENT LAW UPDATE – AUGUST 2013

KEY CHANGES TO EMPLOYMENT LAW: WILL THEY MAKE ANY DIFFERENCE?

Significant changes to Employment Law came into force on 29 July 2013 and more changes will follow over the next 12 months. The impact of these changes remains to be seen although some will probably create more problems than they solve.

The following changes take effect from **29 July 2013**:

- Employment Tribunal fees and New Rules of Procedure
- Protected conversations
- New cap on Unfair Dismissal Claims

Employment Tribunal Fees

Prior to 29 July 2013, there were no fees for issuing Tribunal Claims. From 29 July 2013 claimants will be charged a fee on issuing the claim and a further fee if a claim proceeds to a hearing. These are as follows:

Type of Fee	Type A Claims	Type B Claims
Issue Fee	£160	£250
Hearing Fee	£230	£950

Type A Claims will include breach of contract, unpaid wages claims, holiday pay and redundancy pay and some 'time off' rights. Type B Claims will include unfair dismissal, detriment and discrimination claims.

There is also a remission system whereby people on low incomes will not be required to pay the fees. Given that most claimants will be unemployed, it is expected that the vast majority of claimants will be entitled to remission, so the fees would therefore have limited impact.

There will also be some fees payable by the respondent/employer. These will include breach of contract counterclaims (£160), judicial mediation (£600) and an application to set aside a default judgment (£100). The judicial mediation fee is likely to deter most respondents from agreeing to judicial mediation.

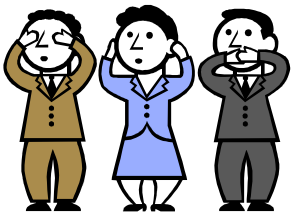
New Employment Tribunal Rules of Procedure

New Tribunal Rules of Procedure were also introduced on 29 July 2013 and will apply to all claims whether issued before or after this date. The new Rules include an obligation on the Tribunals to strike out hopeless claims and make greater use of the deposit scheme in which claimants are required to pay a deposit as a condition for continuing weak claims together with a costs warning. There will also be an increased use of preliminary hearings, for example, to determine jurisdiction issues in discrimination claims rather than dealing with these issues as part of the main hearing. Preliminary hearings will also be used by

claimants to object to any strike out of their claims by the Tribunal from an initial 'paper sift'. The Tribunal will also be able to issue case management directions at the preliminary hearing rather than in a separate case management discussion as applied under the previous rules.

Whilst these proposals seem sensible, without additional resources which have not been made available, there will be significant delays in the system.

Protected Conversations



The purpose of protected conversations is to enable the employer and employee to enter into 'pre-termination negotiations' which will enable employers to exit employees more easily by making such discussions inadmissible in ordinary unfair dismissal claims provided there was no 'improper behaviour' involved. This means that if, for example, an employer makes a settlement offer to an employee whilst disciplinary proceedings are ongoing, this cannot be used against the employer in any subsequent unfair dismissal proceedings if the settlement offer is rejected.

Unless such negotiations result in a settlement agreement, pre-termination negotiations will be of limited value. They do not cover discrimination claims or claims for automatically unfair dismissals (e.g. maternity or whistle-blowing claims) and the scope for accusations of improper behaviour which can include undue pressure, will doubtless be used as a means of increasing any compensation offered.

Compromise Agreements will be renamed Settlement Agreements although the contents of the documents will not change substantially. This was an opportunity missed by the Government to simplify such agreements.

Cap on Unfair Dismissal Claims

If an employee is successful in an unfair dismissal claim, then the maximum compensatory award is £74,200. This is based mainly on loss of earnings (current and future). The employee is under a duty to mitigate his loss i.e. he must try to find work whether on an employed or self-employed basis. If, for example the employee starts a new job within six months on a similar salary, his compensation will be limited to six months' loss of earnings.

New regulations will impose a cap on the compensatory award of *12 months net pay or £74,200 whichever is lower.* This will apply to all claims where the termination is on or after 29 July 2013. By limiting the maximum Tribunal award to 12 months pay, the Government believes it would create more certainty for employers on the likely cost of employment disputes, thus facilitating any settlement. Employers are therefore likely to conduct negotiations by using 12 months pay as a starting point rather than responding to employees' (sometimes unrealistic) expectations of the maximum award.

However, the cap will not affect discrimination claims which many employees will raise as part of any negotiations. There is no cap on any award for discrimination claims.

Other Implementation Dates

Employee Shareholder Status

The new employee shareholder status in which an employee would receive shares in his employer company in exchange for giving up certain employment rights and receiving limited tax benefits, is due to be introduced on **1 September 2013**. Given the criticism these proposals have received and the requirements on the employer, the take up is expected to be small.

ACAS Early Conciliation

This is due to be introduced in **March 2014** and will require all Claimants to apply for early conciliation through ACAS before they are allowed to issue a Tribunal Claim. If the conciliation is unsuccessful i.e. results in no settlement, then they will be able to proceed with the claim and the limitation period may be extended in these circumstances.

Comment

It is currently common practice for employers and employees to engage in informal or without prejudice discussions in which the employee signs a compromise agreement in exchange for compensation and the employer thus avoids tribunal proceedings. By introducing 'pre-termination negotiations', the Government is formalising an established informal practice. Given the scope for accusations of improper practice, particularly if there is a short time limit for accepting an offer, the use of pre-termination negotiations will probably create more problems than it solves. The twelve months cap on unfair dismissal claims should assist in any settlement negotiations but not if there are any whistle-blowing or discrimination allegations. The Tribunal fees will, doubtless, deter some claimants but it is expected most will be eligible for remission so their impact may be limited.

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