Employment Law

Legal Update: February 2011

Cripps Harries Hall.

Resolving Workplace Disputes

Resolving Workplace Disputes – the Government sets out its plans for the future

The Government has launched a consultation on wide-ranging reforms to the Employment Tribunal system. The aim is to encourage early resolution of disputes and to speed up the tribunal process, thereby reducing the cost to the taxpayer and boosting economic growth. We look at the key proposals in this Alert and assess whether they are likely to achieve the desired result.

Unfair dismissal - The Government proposes to increase the unfair dismissal qualifying period from one year to two. If adopted this will mean that employers will be able to dismiss employees in the first two years without a fair reason and will not have to follow any procedure before doing so. The Government appears to believe that, by increasing the qualifying period, it will give businesses more confidence to take on employees. However, critics project that this measure will reduce the number of unfair dismissal claims by around only 4,000 each year. What is of greater concern to many people is that, by increasing the qualifying period for unfair dismissal, more ex-employees will consider that their only route to bringing a claim is to base it on some form of discrimination (however spurious such a claim may be). We envisage that, far from reducing the number of claims, this measure may actually increase the number of claims for unfair dismissal based on discrimination. The worry for employers here is, of course, that dealing with claims for discrimination can be more complex and time consuming coupled with the fact that awards of compensation in discrimination claims are not capped.

We are not persuaded by the Government's belief that a relatively short qualifying period for unfair dismissal is what is holding employers back from taking on new employees. Indeed, when the unfair dismissal qualifying period was reduced from two years to one in 1999, there was no corresponding reduction in employment rates.

Early conciliation - It is proposed that employees should submit the details of their claim to ACAS (on a shorter version of the current tribunal form) within the normal time limits. There will follow a one month period during which the parties will, with the help of ACAS, seek to settle the dispute. ACAS will be able to advise both parties on the likelihood of success and the level of award if the claim is successful. The Government predicts that this could reduce the number of claims by 12,000 per year.

Our concern here (and one which the Government recognises in the consultation document) is the increase in ACAS funding which will be required to make such a system work. Given the pressure on funding in present times, we wonder whether this proposal is actually workable.

Encouraging early settlement - As part of the overall aim to encourage parties to settle their disputes early, the Government proposes that claimants should be required to include a schedule of loss (setting out what sums they are claiming) in their ET1. The hope is that such information will allow the employer to better assess whether or not to fight the case. We are concerned that this will work in practice as claimants are often reluctant to prepare a schedule of loss and even when they do many of the figures are "guesstimates" or based on a misunderstanding of what they are able to claim.

The Government is also considering introducing a rule which will enable either party to make a formal 'without prejudice offer' to settle backed up by penalties for failing to accept it, if it turns out to be a reasonable offer. The idea is that, if a party rejects a reasonable offer and insists on fighting the case and the tribunal later finds that offer to be reasonable, they may either increase the compensation payable or make a costs award. A similar system has operated in the civil courts for many years. We think the introduction of such a facility in the Tribunal system is long overdue. The possibility of incurring financial penalties will, it is hoped, focus the minds of the parties and increase the chances of early settlement.

Charging fees - The Government is keen to reduce the overall number of claims which enter the tribunal system. One way of doing this would be to introduce a fee for bringing a claim, so that those who use the service pay a contribution towards it. Although there has been much speculation in the press, the Government has not announced what fee it proposes. It is going to consult further on this in the 'spring'.

Tackling weak cases - The Government is conscious of the number of weak or vexatious claims that currently block up the tribunal system. They propose to allow tribunals greater powers to make strike out and deposit orders and to allow employers to request further information about a claim before submitting the ET3. If introduced it remains to be seen whether the Employment Judges are prepared to adopt a more robust approach to claims given their concerns about the need to ensure the Tribunals comply with the Human Rights Act 1998 by giving the claimant the opportunity to have their claim heard.

Shortening tribunal hearings - The Government proposes a number of measures to reduce the time hearings take. These include: witness statements being taken as read; allowing employment judges to sit alone in certain cases and delegating some routine work to legal officers. We will be interested to see whether if adopted these changes alter the apparent practice of listing cases for lengthy trials presumably as a way to encourage the parties to settle.

Financial penalties for employers - The consultation document includes a proposal to fine employers who lose a claim. It is suggested that the fine should be 50% of the award made to the claimant subject to a lower limit of £100 and an upper limit of £5,000. Rather like parking tickets, the fine would be halved if paid within 21 days. The hope is that this penalty will reduce the number of claims that make it to the tribunals. We do not think this is an appropriate sanction and should have no place in the Tribunal system. As employees have the right to bring a claim so employers should be able to defend a claim the outcome of which may turn on findings of fact.

The consultation process closes in April so it will be a few months before we know the Government's final plans. Many employers however have already complained that these measures will introduce just more red tape – something they could do without in our current economic climate.

Post-P45 payments

Currently employers who make payments to their former employees after Form P45 has been issued need to deduct basic rate income tax only. If the employee was a higher rate tax payer, they gain a cashflow advantage as any additional tax will not be accounted for until the employee does their tax return for the year. This can be a real benefit if the employee is out of work and has a short-term need for cash.

However, from 6 April this practice will end. HMRC has announced that payments made after the P45 has been issued will be subject to tax under a new 'OT' code. Full details are not yet available, but this will mean that a higher rate tax payer will have the full higher rate tax deducted on such payments at the time they are made. The cashflow advantage will disappear.

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