

There are changes afoot! The Government is currently pushing through reforms of the Employment Tribunal system, ripping up the rule book and re-drafting the Tribunal Rules of Procedure in an attempt to make them more user-friendly and effective. And that is on top of Vince Cable's plans in the Enterprise and Regulatory Reform Bill to speed up the Tribunal process and promote the early resolution of disputes. Whilst most of these changes will be to the actual or potential detriment of claimants, there are also some new issues and potential additional costs for employers to note. In this month's newsletter we give you a flavour of what is likely to change next year.

- **Pre-claim conciliation:** Prospective claimants will be required to contact Acas before they can bring certain types of claim, in an attempt to avoid matters getting as far as formal Tribunal proceedings. At the moment Acas only has a discretionary power to provide pre-claim conciliation and prospective claimants are under no obligation to consider conciliation prior to bringing a claim. Going forward, claimants will have to obtain written confirmation from Acas that pre-claim conciliation has not been successful before being allowed to bring a claim at all. The limitation period for bringing claims will be extended to allow for the conciliation period. This additional step in the process may in itself put some claimants off from bringing a claim. Unless Acas' funding is materially increased, the delays and inconvenience of this new step are likely to be significant.
- **Fees for bringing a claim:** The Employment Tribunal system currently costs the taxpayer an estimated £84 million per year to run and a key driver behind the Government's reforms is the desire to save costs. Last week the Government set out the fees that claimants will have to pay to bring a claim in the Tribunal from summer 2013. Employers will clearly welcome this change, as many feel the current system encourages (or at least does not deter) weak and vexatious claims. And whilst the Government has been keen to reassure its critics that its aim is not to deter claims generally, there can be little doubt that (a) this is untrue and (b) the prospect of paying over £1,000 to pursue a claim to a full hearing will inevitably put some claimants off issuing Tribunal proceedings even where they have a meritorious claim.

Under the proposals claimants will have to pay one fee in order to bring a claim and a further fee if they want to proceed to a full hearing, with the level of fee payable dependant on the type of claim and stage in the proceedings. There will be two types of claim for these purposes: Level 1 claims (generally the more simple and straightforward ones, e.g. unauthorised deduction from wages, breach of contract etc.) and Level 2 claims (everything else!). A summary of the proposed fee structure for single claims is set out below.

Fee type	Issue Fee	Hearing Fee	Total cost
Level 1 claims	£160	£230	£390
Level 2 claims	£250	£950	£1,200

This means, for example, if a claimant wishes to bring an unfair dismissal claim (a Level 2 claim) it is going to cost him £1,200 to go the whole way – a significant amount by anyone's standards and potentially more than his claim is worth.

But what about claimants who bring multiple claims? Although this issue was not addressed in the Government's Response to the recent consultation exercise, it has previously indicated that claimants will not have to pay multiple fees for multiple claims. The fee payable will be calculated by reference to the most expensive type of claim. So if an ex-employee brings claims of unfair dismissal (Level 2), race discrimination (Level 2) and breach of contract (Level 1) he will be required to pay the £250 Level 2 fee to issue proceedings.

Furthermore, there will be fees payable for certain subsidiary applications to the Employment Tribunal. These range from £60 for an application to set aside a default judgment up to £600 for mediation by the judiciary. These fees will be payable by the party making the application so if an employer wishes to bring a counter-claim for breach of contract it will have to pay £160 to do so. A failure to pay the fee means that the application will not be dealt with.

For multiple claims, e.g. where two or more claimants are involved in the same case, all claimants will be asked to contribute to the cost where they can afford to do so. Fees will range from between two and six times the single fee, depending on the number of claimants involved.

Not all claimants will be required to pay a fee. There will be exemptions for those who cannot afford to pay the full fee. The Government is proposing to extend to the Employment Tribunals the fee remission system in the civil courts in England and Wales (whereby individuals may be eligible for a full or partial remission of fees). As many claimants are likely to be in receipt of benefits when they bring Tribunal claims (having quite possibly just lost their job) there are concerns that too many exemptions could undermine the Government's aim to shift the cost burden. However, the political resistance to extracting fees from those on benefits prevented any other outcome.

But it's not all good news for respondents. If a claimant wins, then Tribunals will have the power to order the employer to reimburse the fees paid by the claimant, in addition to any compensation awarded. The Government is also considering a further financial penalty on employers if a Tribunal concludes that the employers' behaviour had one or more "aggravating features". Apparently it will be up to a Tribunal to decide whether a breach of the claimant's rights had aggravating features, but a Tribunal may be more likely to find that an employer's behaviour did have aggravating features where the action was deliberate or committed with malice, the employer was an organisation with a dedicated Human Resources team (presumably on the basis that they should know better), or where the employer had repeatedly breached the employment right concerned. Any financial penalty imposed will be set at 50% of the claimant's financial award, but not less than £100 or more than £5,000. This will be payable to the Government. There will however be a 50% discount if the employer pays up within 21 days of receiving written notice of the Tribunal's decision. This measure is said to be to "encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees", but will strike most employers as merely a fairly naked attempt to boost the Government's coffers.

When it comes to settlement negotiations, some have suggested that claimants might be less willing to settle if they have had to pay the hearing fee. It certainly seems likely that claimants will look to their former employer to pick up the tab for any fees they have incurred in bringing Tribunal proceedings as part of any settlement deal.

- **EAT appeals:** If an employer wishes to bring an appeal before the Employment Appeal Tribunal, it will now incur a cost. There will be an Issue Fee of £400 plus a Hearing Fee of £1,200 to be payable in advance of any hearing.

- **New Tribunal Forms:** Claim and Response Forms are also going to look different. In his recent review of the Tribunal Rules of Procedure Mr Justice Underhill said that these will be re-drafted.
- **Initial sift stage:** Also likely to be welcomed by employers is the plan to introduce an initial sift stage at which every case will be reviewed by an Employment Judge on the papers after the Claim and Response Forms have been received, with a view to considering what directions to make to get the case ready for a final hearing and to strike out at an early stage any claims or responses (or parts) which have no real prospect of success. Many Tribunals already undergo such a process, but this will become a requirement in every case and should further assist in weeding out weak and vexatious claims or defences.
- **Timetabling of hearings:** Tribunals will be able to set timetables for oral evidence and submissions in an attempt to ensure that hearings are dealt with within the time allocated. Hearings are likely to be shorter in any event (which can only be a good thing), bearing in mind that witness statements are now generally treated as read to cut down on the time taken up by witness evidence.

The Government's proposals are being introduced at a time when the number of Tribunal claims is actually going down. According to the latest Annual Tribunal Statistics (for the period 1 April 2011 to 31 March 2012) the Employment Tribunal Service received 186,300 applications in 2011/12, down 15% from the previous year. Even though the bulk of this drop related to collective claims, the proposals outlined above will almost inevitably result in this downward trend continuing.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

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