GLOBAL LEGAL INSIGHTS

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Introduction

The year since the first edition of *Global Legal Insights – Employment & Labour Law* has seen some of the most far-reaching and significant employment law reform in the United Kingdom for many years, combined with a challenging business environment and various shifts in the nature of the employment market. The Coalition Government's programme of employment law reform has gathered considerable pace over the past year and therefore this chapter is devoted mainly to summarising the legislative changes made and to be introduced to the United Kingdom's employment protection regime.

Overview of employment market issues

Unemployment

The Office for National Statistics ("ONS") published a Statistical Bulletin on Labour Market Statistics in the UK on 17 July 2013. According to this report, the number of unemployed people in the UK is currently 2.51 million.

Unemployment dropped by:

- 57,000 between December 2012 and June 2013;
- 21,200 in the month of June 2013; and
- 72,000 between July 2012 and July 2013.

Unemployed people are defined by the ONS as those aged 16 and over who are out of work but seeking and available to work. According to the results of an ONS survey released in July 2013, 7.8% of the workforce aged 16 and over said they were unable to find a job.

However, unemployment figures do not necessarily paint the whole picture. The fact that fewer people are unemployed does not necessarily mean that more people have found jobs. Instead, it could mean that there are more people who are simply not looking for work, or who are not available to work. Phillip Inman, Economics correspondent for the *Guardian*, argues that "[t]here should be some recognition that many people have not found a job but have simply withdrawn from the labour market". (*Falling unemployment? If only it were that simple,* 17 July 2013.)

- According to ONS statistics, long-term unemployment has reached a 17-year high. Whilst the number of people who have been unemployed for a year or less has dropped by 1.59 million, the number of people unemployed for more than a year is now 915,000: this is the highest since 1996.

The claimant count

The number of people currently in work in the UK is 29.71 million. 'Claimant count' refers to the number of people claiming Jobseeker's Allowance. ONS has published statistics which show that this number fell by 21,200 in June this year, and is now 1.48 million. This is its lowest since March 2011 (1.48 million).

Private v public sector

According to statistics published by the ONS in July this year, between March 2012 and 2013 the

number of people working in the private sector rose by 544,000, while public sector employees fell by 112,000 over the same period.

The underemployed

According to statistics published by the Office for National Statistics ("ONS") in November of last year, between 2008 and 2012, the number of workers who want to work more hours increased by one million (47.3%), whether this was through taking on an additional job, working more hours in their current job, or switching to a replacement job which had longer hours. According to ONS statistics, certain occupations have higher rates of what is called "underemployment" than others. This is the case for: cleaners (31% underemployment rate); school midday and crossing assistants (39% underemployment rate); and bar staff (32% underemployment rate). These levels of underemployment may explain why unemployment levels are lower than many experts might have expected in the current economic climate.

Part-time workers

According to ONS statistics published in July 2013, 18,583,000 employees were working full-time and 6,692,000 employees were working part-time during the period of March to May 2013. In the period of December 2012 to February 2013, there were 6,695,000 employees working part-time, so this number has dropped slightly in recent months. It is still significantly higher than in September-November 2012, however, when it was 6,737,000.

Overview of employment law reform

Some of the more dramatic proposals mooted by the Government have not proceeded with, such as the introduction of "compensated no-fault dismissals" which would have replaced the unfair dismissal claim open to all employees with at least two years' service and which attracts (in certain specific instances) maximum compensation of £74,200, with a fixed entitlement to compensation on dismissal and no right to challenge its fairness. However, the changes which have been proceeded with are nonetheless significant.

Many of the recent reforms are perceived as having the objective of reducing the number of Employment Tribunal claims needing to be adjudicated by the tribunals. The volume of tribunal litigation in the United Kingdom has continued to increase. Statistics published by HM Courts & Tribunals Service in June 2013 indicate that the system's outstanding case load for 2012/2013 has increased by 13 per cent from 2011/12, and the number of claims has increased by 3 per cent to 191,541, including a 74 per cent rise in the number of sex discrimination claims. However, there has been a 24 per cent fall in the number of age discrimination claims.

Fees in Employment Tribunals

In an effort to move the burden of tribunal costs away from the taxpayer and onto those using the service, the Employment Tribunals and the Employment Appeals Tribunal Fees Order 2013 introduced fees into the tribunal system at the end of July 2013. Following implementation of this change, a claimant will have to pay fees at two stages: upon issuing their claim, and at a later stage prior to the full hearing. The tribunal will have the power to order the unsuccessful party to reimburse the fees of the successful party.

The purpose of introducing fees is to relieve some of the financial burden on the taxpayer by requiring users of the Employment Tribunals (and the EAT) to make a contribution to the cost of the service that they receive, where they can afford to do so. The Government expects to recoup approximately 33% of the tribunals' costs with the current fee levels. The purpose of having a dual charging point system is to provide a second opportunity for parties to settle.

It is not yet clear what effect this will have on the tribunal system or the number of claims brought each year. While some commentators have predicted that the introduction of fees will deter claimants from bringing claims, others foresee no substantial impact on the number of claims being brought, as claimants turn instead to alternative forms of funding such as contingency fee arrangements or legal expenses insurance. A separate objective of the new regime is to encourage early settlement of disputes. However, this objective may be undermined by when the hearing fee is due to be paid. Respondents may delay entering into meaningful settlement negotiations until a later stage in proceedings than might

otherwise be the case to see if the hearing fee is paid, thereby indicating that the claimant has both the intention and means to actively pursue their case to a full hearing.

Types of claim

Under the fee rules, different fees apply to different types of claims. *Type A claims* are supposed to require little or no pre-hearing work and should be resolved in approximately one hour at a hearing, e.g. a complaint of unauthorised deduction from wages, breach of contract, failure to pay a redundancy payment, or a complaint that the employer has failed to permit time off for trade union activities. All other claims are *Type B claims* and typically take longer to case-manage, and require much longer hearings, e.g. discrimination, whistleblowing or unfair dismissal claims.

An initial fee is payable, and then subsequently a hearing fee before the matter goes to a hearing. Type A claims will cost a claimant £390 to take to full hearing, or £160 if the claim is settled before the hearing fee is payable, whereas Type B will cost £1,200 to take to full hearing, and £250 if settled before the hearing fee is payable. Fee levels increase for multiple claims depending on the number of claimants involved. Certain applications will also attract additional fees, which the applicant must pay, e.g. reconsideration of a judgment or default judgment, and the respondent will be liable for a £600 fee where the parties agree to pursue judicial mediation.

Fees are also now payable in respect of appeals to the Employment Appeal Tribunal.

Remissions

The civil court remissions system will be extended to the tribunal system and made available to those individuals who cannot afford to pay part or all of any fee. To be eligible, an individual claimant must provide proof either that they are in receipt of certain permitted state benefits, or that their household income is below a certain threshold. The full detail of the remission system for tribunal fees has not yet been finalised.

Various concerns were raised about the remissions system during consultation and consequently the Ministry of Justice has launched a separate review of remissions. The current proposal involves a two-stage test of assessing, first, a claimant's "disposable capital", and then their gross monthly income. The consultation closed on 16 May 2013.

New limits on tribunal awards

The Employment Rights (Increase of Limits) Order 2012 came into force on 1 February 2013. As a result, for dismissals in respect of which the effective date of termination falls on or after 1 February 2013:

- a week's pay (for the purposes of calculating the basic award in unfair dismissal cases and statutory redundancy payments) is now capped at £450 − the previous limit was £430; and
- the maximum compensatory award for unfair dismissal is now capped at £74,200 − the previous limit was £72,300. Unfair dismissal is also now subject to a further limit, as described below.

Unfair dismissal − cheaper to dismiss?

Legislation came into force in the UK on 29 July 2013, limiting the amount an employee can receive by way of compensation for unfair dismissal to the **lower of** £74,200 or 52 weeks' gross pay. A week's pay is calculated in accordance with statute but where an employee's pay varies depending upon the hours worked or the amount of work done, then the figure is calculated over a 12-week reference period. The change in compensation will only affect employees whose effective date of termination (determined by statute) is on or after 29 July 2013.

Historically, the cap on compensation for unfair dismissal has been a pure monetary amount – with no reference to earnings. That cap has ordinarily been increased in February each year (and from February 2013 has been £74,200). The UK Government accepts that the yearly increase in the compensation cap (partly due to a one-off jump of £38,000 in 2000) is out of kilter with inflation. More importantly, however, the current cap is also vastly in excess of the median tribunal award for unfair dismissal compensation.

For many years the median compensation awarded by the tribunal for unfair dismissal has been around £5,000. With that in mind, it is tempting to wonder why the government is bothering to introduce a 52-week pay cap in addition to the current monetary limit. In reality, it seems that the goal is to ensure realistic expectations – the ministerial statement (issued on 12 July) states that "the cap aims to give employers and employees more realistic expectations about unfair dismissal award levels". To bolster this, the guidance notes to the Employment Tribunal claim form now contain details about the median awards.

Easier to start negotiations? Pre-termination negotiations and Settlement Agreements

New statutory provisions on confidential pre-termination negotiations came into force in the UK on 29 July 2013. In simple terms, the new provisions permit discussions between employers and employees about terminating employment which cannot be used against either party in a subsequent unfair dismissal claim.

Background

In May 2010, as part of the Coalition Agreement, the Government agreed to undertake a review of employment law. One particular objective of the review was to assist employers to end relationships with employees that are not working out. Following months of consultation about how to achieve this objective, the concept of "confidential pre-termination negotiations" has been introduced with effect from 29 July 2013.

There is nothing new about discussions between employers and employees about parting company. The new rules are supposed to make it easier for employers to conduct such discussions. Currently, if an employer wants safely to raise the prospect of an employee leaving, it will wish to ensure that discussions are held on a "without prejudice" basis (which means that the discussion cannot then be referred to in evidence before a court or tribunal). This sounds straightforward but a discussion is only "without prejudice" if there is a dispute in existence between the parties and the discussion is a genuine attempt to resolve that dispute. Often, when an employee just isn't very good at doing their job, or where they do not "fit" with the employer's business and an employer wants to raise this for the first time, there is no dispute in existence. Whether or not a discussion was really "without prejudice" can often be disputed, and can complicate subsequent litigation if it becomes an issue which the tribunal has to determine.

Raising an employee's departure in the absence of a dispute is a risky business. The employee may resign claiming constructive dismissal (on the basis that the individual then knows that the employer wants to dismiss them, and this makes his or her position untenable). Alternatively, if the parties are unable to reach an agreement and the employer has to then try to dismiss the employee fairly, the employee may well use the fact that there has been a discussion about a possible departure to attack the fairness of the process, and argue that any subsequent dismissal process is futile, pre-determined and therefore unfair.

We often advise employers on how to ensure that a discussion is "without prejudice" and how to minimise the risk of these claims. However, even with the best advice, there remains a risk of dispute about the status of a supposedly without prejudice discussion, not least where an employee deploys this agreement as a means of trying to force the employer to pay more money to settle his claim.

For these reasons, at first blush, the new regime should be helpful for employers.

The new provisions about pre-termination negotiations

The new law is contained in section 14 of the Enterprise and Regulatory Reform Act 2013, which has inserted a new Section 111A into the Employment Rights Act 1996.

The new section is entitled, "Confidentiality of negotiations before termination of employment" and, for ease of reference, this is what it says in full:

"(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).

(2) In subsection (1), "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms

agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved."

What is the scope of the new provisions?

In theory, the new law allows employers openly to suggest that an employee leaves in return for a settlement package without the fear of the discussion being later used against them. There are, however, three important exceptions to this rule. If these exceptions apply, then the employee can rely on what otherwise would have been protected and therefore not capable of being put before a tribunal in evidence.

Excluded claims

Unless the discussions are genuinely "without prejudice" under the existing law (i.e. there is a dispute which the discussion seeks to settle), the protection of pre-termination negotiations only applies in relation to "normal" unfair dismissal claims. Pre-termination negotiations will be admissible as evidence in the many potential claims arising from dismissal other than "normal" unfair dismissal. These claims, such as claims for discrimination, wrongful dismissal and breach of contract, are the ones that tend to be the most valuable. Pre-termination negotiations will also be admissible in evidence if the employee's dismissal would be automatically unfair, for example, if it was because of trade union membership, whistleblowing or asserting a statutory right (Section 111A(3)). Things said or done in the course of pre-termination negotiations can be relied on in support of one of these claims, as opposed to a general unfair dismissal claim.

Improper behaviour

In conducting pre-termination negotiations, the parties must not engage in "improper behaviour". If they do, their pre-termination negotiations will only be inadmissible as evidence to the extent that the tribunal considers it just (Section 111A(4)). Employees may therefore try to argue that they can rely on "improper behaviour" to support an unfair dismissal or constructive dismissal claim.

This stipulation is similar to the rule that discussions which would otherwise be without prejudice will lose that protection if there has been what is known as "unambiguous impropriety". For example, perjury, blackmail or other "unequivocal abuse of a privileged occasion" do not attract the benefit of the without prejudice rule. While no doubt the precise scope of "improper behaviour" will be the subject of litigation, employers need to be careful how they conduct pre-termination negotiations to avoid losing the benefit of the (albeit limited) protection which they will provide. The draft Acas Code of Practice on Settlement Agreements described below (the "Code") provides some commentary and guidance on the issue of what constitutes improper behaviour. The Code is in likely final form but is awaiting Government approval.

Costs

The parties to an Employment Tribunal claim often wish to refer to an offer having been made by one party and rejected by the other in relation to the issue of costs. A party may seek to argue that the other party acted unreasonably in continuing with proceedings despite a settlement offer having been made. Section 111A(5) clarifies that the introduction of pre-termination negotiations will not prevent parties from rejecting offers made during pre-termination negotiations for the purposes of costs applications.

Settlement Agreements

For many years, employees have only been able to waive their statutory employment claims by signing an agreement upon which they have taken independent legal advice. These so-called "compromise agreements" are now renamed, "Settlement Agreements" apparently to make them more intelligible and

user-friendly. Section 23 of the Enterprise and Regulatory Reform Act 2013 provides that references to "compromise" in all the relevant legislation will be changed to "settlement". No substantive change, however, is made to the rules governing Settlement Agreements. As the Code confirms, for a Settlement Agreement to be legally valid, the following conditions must still be met:

- The Agreement must be in writing.
- The Agreement must relate to a particular complaint or proceedings.
- The employee must have received advice from a relevant independent adviser on the terms and effect of the proposed Agreement and its effect on the employee's ability to pursue that complaint or proceedings before an Employment Tribunal.
- The independent adviser must have a current contract of insurance or professional indemnity insurance covering the risk of a claim by the employee in respect of loss arising from that advice.
- The Agreement must identify the adviser.
- The Agreement must state that the applicable statutory conditions regulating the Settlement Agreement have been satisfied.

The Acas Code of Practice on Settlement Agreements

The Code is not binding upon employers. Nor, unlike the Acas Code of Practice on Discipline and Grievances at work, will it impact upon compensation if the parties unreasonably fail to follow its recommendations. Employment tribunals may, however, take the Code into account when considering cases where the issue of the status and propriety of pre-termination negotiations is in dispute.

The content of much of the Code (and, particularly, the section explaining Settlement Agreements) will be familiar to employers. The Code, however, does make a couple of rather surprising suggestions about the practice of entering into such agreements. For example:

- The employee should be given a reasonable period of time to consider the proposed Settlement Agreement. This in itself is not controversial, but the Code's suggestion that, as a general rule, ten calendar days should be the minimum period of time allowed (unless the employee agrees otherwise) is rather surprising and, arguably, not particularly practical. When an employer raises the prospect of an employee leaving, this can often lead to acrimony between the parties and the consequent risk to the employer's business (hence why most employers suggest that the employee should take paid leave whilst the agreement is being negotiated). Allowing an employee ten calendar days to consider the proposal, after which negotiations about the terms of the agreement may not have yet even begun, would drag such discussions out, lead to increased cost for the employer, and potentially give the employee some additional leverage where the employer wants to resolve the situation quickly.
- Employers should allow employees to be accompanied at these meetings by a work colleague or a trade union representative. This is unusual, to say the least, in terms of current HR practice, and no doubt employees would prefer such discussions (which very often involve criticisms of their performance, conduct or personality) to be held in private.

Improper behaviour

Section 111A provides no detail about what constitutes "improper behaviour", and the Code states that this is an issue for the tribunal to decide, depending on the facts and circumstances of each case. According to the Code, however, the following would constitute improper behaviour:

- Unlawful discrimination and all forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
- Physical assault, or the threat of physical assault and other criminal behaviour.
- Putting undue pressure on a party. On the employer's side, the examples given include not giving the reasonable time for consideration recommended by the Code, and saying before a disciplinary process has begun that, if a settlement proposal is rejected, then the employee will be dismissed. However, the Code clarifies that its examples are not intended to prevent an employer setting out in a neutral manner the reasons that have led to the proposed Settlement Agreement, and stating the likely alternatives if an agreement is not reached (such as the commencement of a disciplinary process). On the employee's side, the example given is threatening to undermine the employer's reputation if it does not sign the agreement (unless this is genuine whistleblowing).

Conduct of the kind set out above is clearly improper and this guidance will therefore not change how we currently advise employers to handle these sorts of conversations. However, since the concept of improper behaviour is new, the approach that tribunals will take to interpreting it remains to be seen. For example, how much pressure will an employer be allowed to place on an employee? Will the repeated instigation by the employer of confidential pre-termination negotiations go too far?

Template documents

Previous drafts of the Code contained template letters that employers could use to propose departure terms in a variety of situations. After some criticism, they have been removed from the Code and will be contained in non-statutory guidance, which has not yet been published.

Do the new provisions achieve the Government's aims?

By introducing Section 111A, the Government's aim was two-fold:

- To allow employers to manage difficult workplace issues more efficiently and effectively without having to incur substantial sums on legal advice.
- To enable individuals to leave with their head held high and the certainty of a pay-off, whilst avoiding the uncertainty and stress of taking a case to tribunal.

From an employer's perspective, the new provisions will provide some greater flexibility in straightforward situations where an employee is not performing up to standard or where the employer comes to the conclusion that it is time for an employee to move on. In those situations, gone will be the days of having to create a dispute, by raising the concern (whatever that might be) formally before a without-prejudice situation can be had. However, employers should not get too comfortable. The new provisions do not provide a *carte blanche* for managers to tell an employee when they would like them to leave the business. Such discussions should always be planned carefully in advance, not least to ensure that the discussion will properly fall within the ambit of the new provisions, but also to ensure that whatever is said does not give rise to a claim in itself, where there is a risk of claims wider than unfair dismissal, such as unlawful discrimination. In such circumstances, the employer will need to consider whether it needs the greater protection of a truly "without prejudice" conversation if that can be engineered (in which case, the detailed provisions of the pre-termination negotiation regime will not apply and the situation will be more straightforward). Managers who think these new provisions make the task of dealing with poor performers easier will need to be given a serious health warning about the new system, and careful training about how to use conduct pre-termination negotiations.

Employee Shareholder Status

The Growth and Infrastructure Act 2013 ("**GIA**") is the source of one of the more contentious changes being made to the employer-employee relationship. Under the GIA, employers may set up schemes through which employees give up some of their employment rights in exchange for shares in the employer's business. If the employer and employee both agree, the employee will take a minimum of £2,000 worth of shares in the company and will, in return, give up the right not to be unfairly dismissed, certain rights to request flexible working and training, and the right to receive statutory redundancy pay. They will also be required to give longer notice to return from maternity or adoption leave.

In order to reach agreement on this scheme with the House of Lords, the Commons had to make a number of concessions to alleviate the more controversial aspects of the "shares-for-rights" exchange. As such, the regime is now subject to a number of requirements and exceptions, as well as some generally "employee-friendly" provisions, such as:

- Before agreeing on employee ownership, the employee must receive independent advice and the employer must pay the reasonable costs of seeking this advice (whether or not the employee subsequently agrees to the shares-for-rights exchange). If this does not occur, the employee will enjoy the full range of statutory rights.
- There is a seven day cooling-off period from the date legal advice is given, during which time any acceptance of shares-for-rights will be non-binding.
- There is protection from detriment or dismissal for existing workers who refuse to become employee shareholders.

- Jobseeker's allowance cannot be withdrawn where a jobseeker refuses an employee shareholder job.
- In offering employee shareholder status, an employer must provide to the employee a statement explaining the employment rights that would be sacrificed, as well as information about the shares, and the rights attaching to them.
- The first £2,000 of shares will be exempt from income tax and any gains made upon disposal of the first £50,000 of shares will be exempt from capital gains tax.

The Growth and Infrastructure Act 2013 has been passed, and these provisions relating to employee share status came into force on 1 September 2013. The Finance Act 2013, which received royal assent in July 2013, creates the tax exemptions for the employee shareholder scheme. It has to be said that there is little apparent interest to date in this new structure.

Whistleblowing

The original purpose of the whistleblowing regime under the Public Interest Disclosure Act 1998 was to protect employees who made authorised disclosures of their employer's illegal acts. It was introduced following revelations in official reports on the scandals at BCCI, Maxwell, Barlow Clowes and Barings Bank, that staff had known about employer's malpractices but were afraid to disclose this for fear of their employer firing them. The regime was intended to restrict this protection of legitimate whistleblowers who made disclosures, in good faith, that were both "protected" and "qualifying".

This limited scope for whistleblower protection has subsequently been considerably widened. In *Parkins v Sodexho,* an Employment Appeal Tribunal case in 2002, it was held that an employee could make a qualifying disclosure in respect of his own contract of employment, despite such a disclosure arguably lacking any "public interest" aspect. Employees who complained about their treatment by their employer – either in terms of a breach of an express term of the employment contract, or of the implied duty to maintain trust and confidence – could therefore argue that they were whistleblowing and entitled to claim unfair dismissal without satisfying a qualifying period of service, and to recover potentially unlimited compensation if dismissed because of that whistleblowing.

Section 17 ERRA is designed to limit the scope for employees to be able to run this argument, with the aim that workers will be prevented from making a whistleblowing claim at an Employment Tribunal in respect of purely private matters. In order to qualify for the protection of the whistleblowing legislation, disclosures must, in the reasonable belief of the worker, be made in the public interest. By contrast, section 18 ERRA removes the 'good faith' requirement for a disclosure to qualify as protected. Nonetheless, section 18 ERRA also states that, where a disclosure was *not* made in good faith, compensation may be reduced by up to 25%.

In addition, the Government has sought to provide greater protection from victimisation for workers and agents personally liable for subjecting a fellow worker to a detriment because they have made a protected disclosure. Employers will also be vicariously liable for such detriment under this provision, although there is a defence where all reasonable steps have been taken to prevent the victimisation.

These changes to the whistleblowing regime came into force on 25 June 2013.

Dismissal for political opinions or affiliations

Following a finding by the Court of Justice of the European Union in *Redfearn v United Kingdom* in 2012 that the UK was in breach of the European Convention on Human Rights, the ERRA has amended section 108 Employment Rights Act 1996 to provide that the unfair dismissal qualifying period (of, currently, two years) "does not apply if the reason (or, if more than one, the principal reason) is, or relates to, the employee's political opinions or affiliation". In these circumstances, employees will be able to make a claim for unfair dismissal regardless of their length of service.

Parental leave and pay

The Parental Leave (EU Directive) Regulations 2013 implement the Parental Leave Directive (2010/18/EU) and came into force on 8 March 2013. The new regulations increase the parental leave

entitlement of a qualifying employee from 13 weeks to 18 weeks. Under the Maternity & Paternity Leave etc Regulations 1999, an employee qualifies for parental leave entitlement if he/she has been continuously employed for at least a year and has, or expects to have, responsibility for a child.

The new regulations also extend the right to request flexible working to agency workers returning to work following a period of parental leave.

As of 7 April 2013, HMRC raised the standard rates for statutory maternity pay, statutory paternity pay and statutory adoption pay to £136.78 (from £135.45). The weekly earnings threshold for these payments rose from £107 to £109.

Collective redundancy consultation

The Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013, which came into force on 6 April 2013, introduced three key changes to the rules on collective consultation.

(a) Timetable

Where an employer is proposing to dismiss 100 or more employees at one establishment within 90 days, the employer must now begin consulting with the appropriate representatives at least **45 days** before the first dismissal takes effect. This represents a reduction from the previous requirement to consult for 90 days before dismissal, although it is important for employers to note that the maximum potential protective award of up to 90 days' gross pay in respect of each dismissed employee has **not** been reduced. This decision is now on appeal to the Court of Appeal.

(b) HR1

Where an employer is proposing to dismiss 20 or more employees at one establishment within a period of 90 days or less, the employer must notify the Secretary of State of its redundancy proposal, using an HR1 form. The notice that it must serve depends on the number of employees the employer is intending to make redundant. In the case of 20-99 redundancies, the Secretary of State must be notified at least **30 days** before the first dismissal takes effect (and before giving notice to terminate an employee's employment in respect of any of the dismissals). However, where 100 or more employees are being dismissed, the Secretary of State must be notified at least **45 days** before the first dismissal.

(c) Fixed term employees and the collective redundancy thresholds

Where an employer makes a proposal on or after 6 April 2013 to dismiss **20** or more employees, the collective redundancy consultation obligations will not apply to those individuals who are employed under a fixed term contract **unless**:

- the employer is proposing to dismiss the employee as redundant; and
- the dismissal will take effect before the expiry of the specific term, the completion of the particular task, or the occurrence (or non-occurrence) of the specific event that the employee was employed for.

In other words, where an employee's fixed term contract is to terminate on the date agreed under the contract, the employer does not need to include that employee in the calculation of the number of proposed redundancies, even if the dismissal will occur within the same period as the proposed redundancies.

ACAS guidance

In conjunction with the changes made to the statutory rules on collective redundancy consultation, ACAS has published a guidance booklet on collective redundancy consultation aimed at employers, entitled "How to manage collective redundancies".

Employment Tribunal rules

New Employment Tribunal rules of procedure came into force on 29 July 2013. The new rules can be found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237). Some key elements of the amended Employment Tribunal Rules ("**new ET Rules**") are summarised below.

Sift stage

Under rules 26(1) of the new ET Rules, an Employment Judge will consider each case "*as soon as possible*" after the Respondent has submitted their response to the Employment Tribunal. The Employment Judge can dismiss (in full or in part) a claim or response, if either has no reasonable prospect of success, or the tribunal does not have jurisdiction to deal with the matter (sections 27 and 28 of the new ET Rules).

Preliminary hearings

Instead of case-management discussions and pre-hearing reviews, rule 53(1) of the new ET Rules introduces the concept of a preliminary hearing. It is currently unclear how the private characteristics of case management discussions, and the public nature of pre-hearing reviews, will interact in practice under the new preliminary hearing system.

Case management discussions are limited to *"matters of procedure and management"* – rule 17(2) of the previous ET Rules. Their purpose is to distill the key issues in advance of the full hearing, identify what the parties need to do to prepare for the full hearing, and to issue directions on those steps. Case management discussions are private and therefore tribunals cannot rule on strike-out applications, or where there is contention over whether the claim was brought in time, the employee status of the claimant, or whether a deposit should be paid in order to allow the claimant to continue with the claim. Before the new ET Rules, therefore, if there were any such preliminary issues, a further pre-hearing review would have to take place (rule 18(2)). Under the new regime, however, there is a single hearing incorporating both concepts. Under rule 53 of the new rules, a tribunal can make case management orders (rule 53(a)) and rule on any preliminary issue (rule 53(1)(b)). The tribunal can also rule on strike-out applications (rule 53(1)(c)), or make a deposit order (rule 53(1)(d)).

Withdrawal

The withdrawal process has been simplified under rules 51 and 52 of the new ET Rules. Once a Claimant has withdrawn their claim, it "comes to an end", and the Respondent is longer required to apply to the tribunal in order to have the claim dismissed.

Unfortunately the new ET Rules do not state when the withdrawal will be effective (under the previous rule 25(3), dismissal took effect when the tribunal received written notification of the withdrawal.) This does not apply to the withdrawal of a claim via a prescribed ACAS settlement agreement, as a result of a conciliation process which culminates in the signing of a COT3 form. Respondents who have signed a COT3 with a Claimant are already protected from a claim by the Claimant, as the COT3 form operates as a bar to the proceedings in the ET1 form.

Final hearing

For claims that proceed to the final hearing, rule 44 under the new ET Rules gives the public the right to inspect witness statements. Rule 45 of the new ET Rules allows tribunals to set strict limits on the time a party may take giving evidence, questioning witnesses and making submissions. It is possible to apply for a restricted reporting order under rule 50 of the new ET Rules.

Under the previous ET Rules, a party could apply for a restricted reporting order under section 18(7)(g) and section 50(1)(a) and (b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 in any case involving allegations of sexual misconduct (Rule 18(7)(g) of the previous ET Rules). The new ET Rules do not limit this to cases of disability or sexual misconduct. Consequently, there is much more flexibility for parties to apply for restricted reporting orders. Tribunals also have more discretion to decide whether a tribunal may now make these orders, *"at any stage of the proceedings, on its own initiative or on application... so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person"* under Rule 50(1) of the new rules. Rule 50(3) extends this discretion to orders for private hearings and anonymity orders.

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Charles Wynn-Evans leads Dechert's London employment practice. His work covers all aspects of contentious and non-contentious employment law, including downsizings, discrimination issues, industrial action, boardroom disputes, restrictive covenants, severance negotiations, tax issues and all kinds of employment-related litigation in the Employment Tribunal and High Court. Charles trained with the firm and was admitted as a solicitor in 1992. He has been a partner at Dechert since 1997. He writes regularly on employment law issues for journals such as *People Management, Personnel Today, Industrial Law Journal* and *Employment Law Journal* and is the author of *Blackstone's Guide to the New Transfer of Undertakings Legislation* (Oxford University Press, 2006) and *The Law of TUPE Transfers* (Oxford University Press, 2013). He is an accredited CEDR Mediator and a member of the Employment Law Committees of both The Law Society of England and Wales and the City of London Law Society. He is a fee-paid (part-time) employment judge assigned to the Birmingham region.

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