Reducing the burden on business – changes to employment law in the UK?

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Introduction

The UK labour market is one of the least regulated labour markets among developed countries, with only the US and Canada having lighter overall regulation. Nevertheless, the UK government is concerned to do more to encourage firms to take on staff and to have a labour market that is 'flexible, effective and fair' amidst fears that the economic downturn and an inability to compete globally have been exacerbated by debilitating regulation. With pro-employer labour law reforms being discussed in other European countries, it is conceivable that the economic downturn will trigger a change in approach in Europe.

In a speech in late 2011, the government set out a number of proposals which, if brought into force over the next few years, will have the result of radically overhauling employment legislation in the UK.

The government's proposals have the aim of breaking down structural regulatory barriers that are believed to be onerous and place unnecessary demands on businesses. The government's view is that less regulation will lead to a more successful economic recovery in the UK while still continuing to safeguard workers' rights. Brave claims have been made about the proposals, with the government estimating that it will deliver £40 million in direct savings to employers each year. A summary of the proposed changes is set out below.

Measures to reduce workplace disputes

The key changes involving a radical shake-up of the UK's labour courts (known as employment tribunals):

Claimants to pay a fee

The government has confirmed that from April 2013 a claimant will need to pay a fee in order to lodge a claim in an employment tribunal. How this fee will be structured (eg, simply one fee or perhaps an initial fee for lodging the claim and a second fee if the claim proceeds to a hearing) and the level of fee have not yet been decided, and will be the subject of a further consultation process.

Financial penalties for employers

The government has confirmed that an employment tribunal will have the discretion to levy an additional fine on an employer that has been found to have breached an individual's rights, in addition to the payment of compensation. The fine would amount to half of the total award made by the tribunal, with a minimum threshold of £100 and an upper limit of £5,000, and it would be payable to the government, not to the claimant. Such a payment would be reduced by half if paid within 21 days. Where an individual has been compensated for a breach of his or her rights with a non-monetary award, the tribunal will ascribe a value to it for the purposes of the fine.

Early conciliation of claims

The government has proposed that prior to a claim being submitted to an employment tribunal in the normal way, claimants will be required to submit details of their claims to the Advisory, Conciliation and Arbitration Service (Acas) in the first instance and will then be offered the option of engaging in early conciliation. Acas is a UK government-funded independent body offering conciliation services to parties involved in employment tribunal claims. The 'clock' for the purposes of the time limit in which to bring a claim would be stopped once the claim form is lodged with Acas. Acas would then have one month in which to attempt to resolve the dispute.

The proposal has immediately given rise to concerns from employment lawyers and those employers that have experience in dealing with Acas. Acas is already stretched in its ability to deal with the existing number of claims and there is concern that, without significant government investment in the service, Acas will be unable to cope. At the moment, the proposal is unlikely to be implemented before 2014, giving the government some time to focus on improving Acas.

Qualifying period for unfair dismissal increased to two years

The increase in the qualifying period for unfair dismissal from one year to two years was implemented April by the government. All employees recruited on or after 6 April 2012 will now be required to have two years' service to pursue an unfair dismissal claim. Employees already employed by this date will continue to accrue the right to claim unfair dismissal after one year.

The government has estimated that the increase in the qualifying period will reduce the number of unfair dismissal claims brought every year by between 2,100 and 3,200 claims (ie, 4 per cent to 7 per cent of all unfair dismissal claims). It should be noted, however, that there is no qualifying period required for the right to bring a claim due to being automatically unfairly dismissed (a dismissal on the grounds of maternity, whistle-blowing, etc), or for discrimination. This measure may encourage employees to bring such claims where they do not have the right to bring an unfair dismissal claim, although the government has stated that it is unconvinced that this will be an unintended consequence.

'Protected conversations'

The government intends to introduce a system of 'protected conversations'.

A 'protected conversation' will be where an employer can have a frank discussion with a member of its staff on an issue such as retirement or performance that is not admissible as evidence in the event of an employment dispute. This is effectively an extension of the 'without prejudice' rule that exists in the UK, which allows parties to have a conversation when they are already in dispute that is not admissible as evidence in an employment tribunal. The protected conversation could be initiated at any time (ie, not restricted to situations where the parties are already contemplating litigation) by either the employer or the employee.

A particular aspect of 'protected conversations' that would be welcomed by employers is that the government will be consulting on whether they can be used by employers to propose a compromise

agreement (the UK's form of a settlement agreement, which includes a binding waiver of statutory employment law claims) in the absence of a formal dispute without this leading to a constructive dismissal claim.

The introduction of 'protected conversations' would be most useful where an employer wishes to tell an underperforming employee that it wishes to dismiss him or her and that if he or she goes quietly, he or she can sign a compromise agreement rather than being put through a performance procedure.

It is likely that employers will be wary of using a protected conversation to discuss performance issues with an employee because should the employee's performance fail to improve and he or she is subsequently dismissed by the employer and brings a claim in an employment tribunal, the protected conversation could not be adduced as evidence of the employer's following a fair procedure.

The government has confirmed that discriminatory conversations will not be protected to ensure that employers cannot exploit the use of protected conversations. If an employer discriminates against an employee during such a protected conversation because of a protected characteristic, then the employee will be able to claim that the conversation concerned a prohibited ground and was therefore never protected in the first place. Additionally, if an employee believes that he or she was discriminated against during such a 'protected conversation', the employee is likely to refer to the conversation in his or her claim in an employment tribunal in any event, arguing that it should not qualify as protected.

It is thought that the introduction of this measure will lead to satellite litigation, where employers who have relied on protected conversations and thought that they were protected from litigation have to persuade the employment tribunal that they were so protected.

Simplifying settlement and rapid resolution

The government is aware that settlement negotiations can take some time to reach and that, where settlement cannot be reached, the tribunal process can still be lengthy, particularly for more straightforward disputes. To resolve these issues, the government is proposing to simplify compromise agreements and to look at ways of providing a quicker and cheaper alternative to the tribunal process for resolving disputes (a 'rapid resolution' scheme). One possible option for rapid resolution will be where an independent legal expert makes a decision based on written evidence submitted by the parties. Opponents of the proposal are skeptical as to how this will work in practice. An employment tribunal was originally set up to be an informal arena for resolving disputes. However, employment law has become one of the most complicated areas of law and it is now rare in an employment tribunal for parties, particularly respondents, to attend unrepresented by legal experts.

Whistle-blowing

To close a loophole in the current UK legislation relating to whistle-blowing, the government proposes to prevent employees from whistle-blowing about breaches to their own personal employment contracts. The legislation was never designed to allow for this and the government is therefore going to stop this from happening in the future.

Compensated no-fault dismissals for small employers

One of the more radical proposals from the government is to introduce compensated no-fault dismissals for employers with fewer than 10 employees. In a recent survey carried out by the government, half of businesses with fewer than five employees, including sole traders, opined that employment regulation was discouraging them from employing staff. This proportion steadily dropped as the size of the employer increased. The government wants to encourage small employers with fewer than 10 employees to recruit, and has proposed the introduction of the concept of compensated no-fault dismissal whereby such a business could dismiss an employee where no fault was identified on the part of the employee. The proviso to this is that a set amount of compensation would be paid to the employee. The business would avoid having to go through any formal dismissal procedure and the employee would be prevented from pursuing an unfair dismissal claim in an employment tribunal. Employees would still retain their rights to pursue claims for discrimination where they believe that they have been dismissed for an automatically unfair reason, including whistle-blowing or asserting a statutory right, such as the right to be paid the national minimum wage. A call for evidence has been made by the government to obtain information about this new concept. The proposal is similar to laws that have been enacted in Germany, where the view has been taken that small employers should be less regulated in order to encourage their growth.

Dismissal

The government believes that existing dismissal processes are too onerous and complex and that there is a general lack of understanding in applying the procedures. A call for evidence has been made by the government to obtain information about concerns with the existing dismissal processes and how the dismissal processes can be adapted to make them simpler to use, quicker and clearer. How the government proposes to streamline the determination of whether an employer acted reasonably in dismissing remains to be seen. One option on which the government is seeking views is whether the Australian Small Business Fair Dismissal Code might be successfully applied in the UK to replace the Acas Code of Practice with regards to disciplinary actions and grievances.

Red tape challenge

One of the government's biggest concerns at the moment is that the UK is overburdened with rules and regulations. Following a review of the existing 159 regulations, the government proposes to scrap, merge or simplify over 40 per cent of them.

Recruitment sector

One of the government's key aims of employment reform is to encourage people to re-enter the workforce. To aid this recovery, the government is proposing to simplify and streamline the recruitment sector, the rules for which have become increasingly complex in recent years.

National minimum wage

The current body of 17 different regulations is due to be consolidated into one set of regulations to streamline the national minimum wage regime. The government confirmed that there will be no discussion on the national minimum wage concept, which is to remain in the UK.

Collective consultation

At present, in the UK, where an employer is making 100 or more people redundant at one 'establishment', the employer must undergo a 90-day consultation period to consult with employee representatives of the affected employees. The government wants to explore the possibility of shortening the process, reducing it to 60, 45 or possibly even 30 days. At the end of 2011, the government called for evidence on the operation of the rules for collective consultation.

The trade unions oppose any changes to the current legislation, arguing that longer consultation periods often result in a reduction in redundancies and that almost one-third of workplaces have agreed to consultation periods that are in excess of the minimum periods. This view is not shared by the business lobby, which believes that meaningful consultation can take place in 30 days in the majority of cases.

Acquired Rights Directive

The government has faced criticism from businesses that the UK's implementation of the Acquired Rights Directive (known as the Transfer of Undertakings (Protection of Employment) Regulations or TUPE) is overly bureaucratic and goes beyond what is required by Europe. A call for evidence is due to be announced to look at the TUPE rules and see how they can be simplified.

Political objection and persuasion

Political objection to the proposed changes has been severe. Those in favour of change argue that it is too difficult to hire and fire employees in the UK and that employers are discouraged from taking on new employees. The business lobby wants the government to speed up the process of employment law reform to aid recovery as soon as possible. Advocates of change are pointing towards the US for inspiration, as it has made real progress in reducing unemployment. In the US, it is as easy to fire employees on the whole as it is to hire them.

Those against change believe that workplace rights should not be reduced, as they provide employees with a reasonable amount of protection, and that employers already have too much power. The trade unions, in particular, believe that employers already have ample power to hire and fire staff, that increased deregulation will mean that employees are more vulnerable, and that the proposals will not encourage employers to hire more staff.

The German way?

The UK government has looked to Germany for inspiration. Germany has weathered the economic downturn much better than many of its European neighbours. Germany took the approach that it needed to be more flexible when it came to labour market regulation, including improving flexibility for parent companies and deregulation for small employers to encourage them to hire. Both of these proposals have been and are continuing to be considered by the UK government. In addition, when the financial crisis hit Germany, the German government introduced legislation to stop employers from laying off workers, a policy now widely praised for being successful at preserving employment in industries in which the underlying businesses were sound and there was a danger of valuable skills being lost. The key to Germany's success has therefore been not just to focus on reducing red tape but to regulate carefully and smartly.

Conclusion

The UK government has made very clear that it is committed to reforming employment legislation and that the Employment Law Review will last for the lifetime of the current Parliament. It is likely that we will see few changes to legislation in 2012. However, the government will come under increasing pressure in the next couple of years to make real changes if the UK economy continues to recover slowly from the economic downturn.

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