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BARGATE MURRAY - EMPLOYMENT TRIBUNAL FOCUS

Philip Henson, Partner in the City of London (UK) law firm **Bargate Murray** looks to how business leaders, and lawyers, should be aware of the far reaching Government proposals to change the current Employment Tribunal system.

Far reaching changes to Employment Tribunals are imminent

The launch of the "*resolving workplace disputes*" consultation by the Department for Innovation, Business and Skills (BIS) is described as being the next step in the Governments comprehensive review of employment laws. In reality the consultation sketches out a roadmap to fundamentally change the current tribunal system into a more business friendly model.

Proposals include: charging fees; increasing the cap on costs awards; increasing the level of deposit awards; and removing payments for the expenses of witness. These proposals will not go down well with Claimants and Unions alike; who will no doubt view them as putting barriers in the way of access to justice.

Some of the wide ranging consultation proposals will be welcomed with open arms, including:

- Encouraging parties to resolve disputes earlier (through ACAS, and implicitly through mediation);
- Making strike out powers more flexible, with "*procedural safeguards to be built in;*
- Allowing Employment Judges to be able to issue a deposit order at any stage in the proceedings;
- Introducing a mandatory requirement for claimants to provide a statement of loss in the ET1; and,
- Shortening tribunal hearings by taking witness statements as read.

The more controversial aspects of the consultation include:

- Introducing "fee charging mechanisms". This is not set out in any detail however, the consultation includes the example of "*where claimants lodge claims (and respondents choose to counter-claim), and/or for parties in claims that proceed to full hearing*". It does not seem to be envisaged that any fee will be charged when a Respondent submits its ET3.

- Extending the qualifying period for unfair dismissal claims from the current one year to two years. The Government estimates that this will reduce the level of claims by 3,700 - 4,700 a year.

- Introducing Legal Officers to deal with case management. The consultation seeks views on the "*qualifications, skills, competences and experience we should seek in a legal officer*".

  Practitioners should note that the consultation also seeks views on the type of interlocutory work (which the consultation considers "*could be undertaken by any competent person*") that might be delegated, so clearly this proposal will be expanded. Under the proposal Legal Officers could be: experienced administrative officers; qualified lawyers employed as registrars or legal assistants; or a 'junior' rank of judge or judicial officer.

- Introduce a rule whereby either party can make a formal settlement offer to the other party, or parties, as part of formal employment tribunal proceedings, "*backed by a scheme of penalties and rewards*". The consultation proposes a system similar to the "Scottish Courts' judicial tender model" (see how many English practitioners put that search term into Google!), and not a Part 36 model.

- Removing payment of witness expenses. The Governments argument is that this will lead to a reduction in the duration of some hearings, as "*only witnesses that are strictly necessary will be called*". Surely it is simply intended to save Government money. It is unlikely to be the main consideration for witnesses I would suggest that a greater deterrent to witnesses attending a tribunal hearing would be the necessity to take time off work to give their evidence.

- Increasing the current cap on the level of costs that may be awarded from £10,000 to £20,000. The consultation emphasises that "*it is not our intention to move towards a general costs-recovery policy*".

- Reviewing the formula for calculating employment tribunal awards and statutory redundancy payment limits.

- Increasing the current level of the deposit which may be ordered from the current maximum of £500 to £1000.

- Extending the jurisdictions where judges can sit alone, allowing "*more efficient use of lay member resource*" – (it is noteworthy that this is not defined). Subject to discretion, unfair dismissal cases to normally be heard by an employment judge sitting alone.

  This may lead to a two tier level of tribunal judges, and does little to address the reality that many unfair dismissal claims often feature as just one strand of several claims. The annual statistics published by Tribunal Service show that for 2009-10 the average number of jurisdictional complaints per claim was 1.7. Could this be the beginning of the end for lay members?

- Proposing that claimants submit key details of their dispute (using what will amount to a shortened version of the ET1 claim form) to ACAS within the relevant time limit.

It is proposed that ACAS will have no role in determining whether the claim is in time or not; they will, however, date-stamp the form on receipt, and that will subsequently allow the Tribunal to decide whether to accept or reject the claim. This dual process is likely to confuse many businesses.

The consultation envisages that the clock (for the relevant time limit) will stop once the claim is received by ACAS and that there will then be a statutory period of time (they propose 1 calendar month) for ACAS to attempt to conciliate the dispute.

Resolving disputes

The amount of claims lodged at the Employment Tribunal for the period 1 April 2009 – 31 March 2010 show that there has been a 56% increase in claims from 151,000 for the period 2008/2009 to 236,100 claims in 2009/2010; although it should be noted that those figures include multiple claims.

The role of ACAS

The aspiration in the consultation to encourage employers and employees to work together to resolve workplace disagreements should be welcomed. Work place mediation will most likely be an area of substantial growth. The role of ACAS should rightly be heralded as a successful way of resolving disputes, as 70,600 claims were ACAS conciliated last year.

The Government intends to provide all potential claimants with access to pre-claim conciliation by ACAS - free of charge to all those who want it; and for ACAS to provide claimants with information about what they can expect from a Tribunal, including the time involved and what a tribunal might award.

The key issue will be whether ACAS has adequate resources to deal with a likely surge in demand. Perhaps the proposed tribunal fees will pay for the service to be expanded? In my own busy employment practice it is increasingly evident to me that ACAS case workers have an almost insurmountable level of cases to deal with.

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