Employment

All change for employment law?

Chris Bryden & Michael Salter predict a year of transformation

IN BRIEF

- 2012 heralds numerous reforms already announced in the field of employment law.
- It is likely that many more reforms will be announced in the course of the year.

This article touches upon a few of the changes and reforms that will come into force this year, and considers in brief some of the more radical proposals that may make their way into law. It is impossible to cover all of the forthcoming changes in 2012, so this article discusses those areas of most likely interest to employment practitioners at the beginning of a year of change.

Awards, costs, expenses & fees

First, for claimants, the good news. The annual increases in the sums that tribunals are able to award in those areas to which compensation caps apply come into force next month (1 February 2012). The upper limit on compensation for awards of unfair dismissal will rise to £72,300 (from the present £68,400). The maximum week's pay figure increases to £430 from £400 (see the Employment Rights (Increase of Limits) Order 2011 (SI 2011/3006)). These increases are in line with established policy.

Proposed reforms to the power of tribunals to award costs are more controversial. At a date to be fixed, but likely during April 2012, it is intended that the cap on tribunal awards of costs will be increased to £20,000 from the present £10,000 (though, as at present, greater sums may be awarded if assessed by a county court judge). In addition, the power of the tribunals to make deposit orders will be increased in scope from the present £500 to £1,000. While this latter reform is to be welcomed, the increase in the costs cap is more alarming, as it is likely to be coupled with a move away from a general "no costs" presumption towards the county court system of "loser pays". The result of such a shift is likely to make litigation riskier for claimants, even those with ostensibly meritorious claims, but also to make the consequences of losing more serious for respondents. This, in turn, may lead to a greater spend on legal advice and spiralling increase of costs.

Also in April 2012 (subject to the date finally being fixed by Parliament), the provision that witnesses may recover a contribution from the state in reimbursement of their expenses is to be abolished, replaced with a power for the tribunal to award such costs against an unsuccessful party. It is questionable to what extent a tribunal will seek to use such powers, meaning that witnesses will likely lose out.

Much trailed in the national press, have been the proposals by government that fees be introduced to allow claimants access to employment tribunals. While still the subject of consultation (closing on 6 March 2012), there is a growing concern that such fees will be introduced. The consultation, launched last December, notes that the cost of funding the tribunal system is in the region of £84m.

The consultation paper proposes an initial fee to the claimant to begin a claim, in the sum of £150–£250, with an additional hearing fee of £250–£1,250, on the basis that the limit to the maximum award is removed; alternatively a fee of £200–£600 for a claim of up to £30,000, with an additional fee of £1,750 for awards sought above this amount. Tribunals would be given powers to order the loser to reimburse the fees of the winner. There are obvious difficulties with both proposals. The average award for unfair dismissal is in the region of £9,000. Fees in the amount proposed are clearly disproportionate to such awards.

Many claimants who require access to the tribunal will have lost their jobs and will not have ready recourse to the fees claimed, though they may be eligible for waivers if on benefits. Awards of reimbursement of costs do not assist where there are difficulties in enforcing such awards, with the costs associated with county court enforcement action. Many claims are presently funded by legal expenses insurance; will the fees also be covered, and if so, will premiums rise across the board? More fundamentally, should a person be prohibited by upfront expense from seeking a remedy?

Procedural changes

Again on a date to be fixed, likely to be in April 2012, the current prevailing practice of witnesses reading out their

witness statements by way of their oral evidence in chief is to be changed so that the basic position becomes that statements are taken as read, save if the tribunal directs otherwise. This follows the guidance given by Underhill P in *Mehta v Child Support Agency* [2010] UKEAT 0127/10/0511, [2011] All ER (D) 177 (Mar), though potentially goes further by making the taking as read of statements the norm. While there will be initial time savings from not having to read out lengthy statements, this may mean the need for more in-depth examination in chief, as well as reference to documentation.

It is also intended to streamline unfair dismissal cases by removing the "industrial jury" and allowing employment judges to hear such cases alone, unless they direct otherwise. Again, this is a change that is likely to be implemented in April 2012. This change is again clearly intended to reduce the time taken to decide unfair dismissal cases, but removes the benefit of the experience of the lay members as to, for example, fairness in the circumstances, in relation to instant cases.

Finally, it has been confirmed that in April 2012 the qualifying period for unfair dismissal will be increased once again to two years. It will apply to employees who join an employer on or after 6 April 2012; the one year period will continue for those starting before that time. The relevant regulations have not as yet been published.

Proposed legislative changes

On top of the various reforms due to be implemented, the government has made clear that there are likely to be at the least proposals for significant change in the field of employment law in the coming months. As well as an increased role for ACAS, proposals that have been mooted include a different, summary, system to determine low-value claims such as for holiday pay; "compensated no-fault dismissal" for smaller firms; a review of the rules governing employment tribunals; and the prospect of the levying of penalties on employers for breaching rights. It is also mooted that the legislation relating to whistleblowing will be amended, as will the operation of compromise agreements, including urgent amendment to s 147 of the Equality Act 2010 to make clear that compromise agreements can be used to compromise matters under the Act.

In addition, the government has flagged up the prospect of "protected conversations", though it is unclear how these are supposed to be implemented, or whether, for example, overt discrimination should be tolerated provided that it falls within such umbrella, or whether the contents of such a protected conversation could amount to a "last straw" for constructive unfair dismissal purposes (by analogy to a without prejudice discussion, it is likely not to: *Brodie v Ward* [2007] UKEAT 0526/07/0702).

Conclusion

Changes to costs rules, differences in procedure and the potential for the introduction of fees will each bring different challenges. What will most bear watching however are the proposals for further reform. How much of an impact these will make on access to justice and the way in which lawyers practise remains to be seen. NLJ

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