

DBULLETIN

Employment law reform - all change?

As you will have no doubt heard, the Government is proposing radical reform to employment law.

On 23 November 2011, the same day as the Government set out its written response to the Resolving Workplace Disputes consultation on reform of the employment tribunal system, Business Secretary Vince Cable announced a host of proposals for the reform of employment legislation and policy.

Although the package of reforms is wide ranging, some elements of it have already been promised while others are subject to a call for evidence and further consultation.

Whereas Dr Cable says that deregulation will reduce unnecessary demands on business while safeguarding employees' rights, and some Tory MPs still say that the changes will not help businesses quickly enough, the unions are outraged. Len McCluskey, general secretary of Unite, has said "it is appalling that this government should concentrate on making it easier to fire people, rather than getting them back to work." Citizens Advice has said that the proposed changes to the tribunal system are "nothing short of a charter for rogue employers".

While businesses may be relieved to see this reversal of the trend for increasingly restrictive and complex employment law, there are concerns about how effective this approach will be in actually creating jobs. Dr Cable argues that the changes will make it easier for businesses to take on staff, but it is debatable to what extent jobs can be created unless there is an increase in demand for goods and services. In fact, a survey of small and medium sized companies found that only 6% of these employers said employment regulation was the main obstacle to their success.

In implementing these reforms the government runs the risk of simply making employees feel they are losing their ability to seek redress when their

employment rights are eroded, while businesses struggle to get their heads around yet another set of regulations in an area of the law that is in constant change.

Summary of the proposals

Dr Cable identified the following key areas for reform:

- Requiring complaints to be submitted to Acas for pre-conciliation before a tribunal claim can be issued
- Introducing the concept of "protected conversations" for micro-businesses to enable employers to raise workplace issues "in an open way, free from the worry that it may be used as evidence" (with the proviso that they will not extend to protect acts of discrimination)
- Improving CRB checks by making them instantly accessible online
- Doubling the qualifying period to bring an unfair dismissal claim for one year to two years (see below)
- Simplifying compromise agreements
- Introducing a more modern system of parental leave that reflects the greater involvement of fathers in childcare, and extending the right of flexible working to everyone

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- Introducing fees for different types of tribunal claims (see below); and
- Responding next year to Dame Carol Black's review of sickness absence (see below).

The Government will also be seeking views on the following ideas:

- Reducing the collective redundancy consultation period;
- Simplifying TUPE, which currently goes beyond the requirements of the European Acquired Rights Directive which it implements;
- Introducing the concept of "compensated no-fault dismissals" for micro-businesses; and
- Changing the Acas Code of Practice to slim down dismissal procedures.

Responses to the consultation

The response to the Resolving Workplace Disputes consultation contains a number of other reforms which were not addressed in Dr Cable's speech and which the government intends to implement in April 2012, where possible. The aims of the consultation were to achieve more early resolution of disputes without the need for the tribunal system, a "swift, user-friendly and effective" tribunal system and to help businesses "feel more confident about hiring people".

Some of the key proposals from the consultation response are as follows:

Mediation – the government will undertake a long term reform programme to increase the use of mediation to resolve disputes, including undertaking a pilot scheme in the retail sector (who have already invested in in-house mediation services) to explore how retailers can share their expertise with smaller employers. It will also fund a mediation training scheme to create networks of mediators that could provide low cost mediation to other organisations.

The responses noted that mediation was most effective in cases of bullying, discrimination and diversity and that it was only effective before the involvement of disciplinary and grievance procedures, the termination of employment or

litigation.

Compromise agreements – the response raised various issues employers faced about the complexities and costs involved in entering into compromise agreements and the government will now consider how to draft a standard text and guidance for parties to use, as well as consulting on whether compromise agreements can cover all existing and future claims without the need for a full list of causes of action.

Early conciliation – the government will introduce measures requiring prospective claimants to submit details of their claim to Acas first, who will then offer them the option of early conciliation during a period of one month. If either party refuses the option of early conciliation or if it is unsuccessful, the claimant will be able to submit their claim to the employment.

Judges sitting alone – with a view to saving taxpayers' money, unfair dismissal cases will be heard by a judge sitting alone (rather than together with 2 lay members), unless they direct otherwise.

Financial penalties for employers – the government intends to allow tribunals to levy financial penalties, payable to the Exchequer, by employers found to have breached employment rights where the breach involves unreasonable behavior such as negligence or malice. The penalty will be half the amount of the total award, with a minimum threshold of £100 and a maximum of £5,000, and may be reduced by 50% if paid within 21 days.

Increase of unfair dismissal qualifying period

The increase of the qualifying period for unfair dismissal from one to two years is one of the most controversial decisions announced, and will take effect from April 2012.

The intention behind this seems to be to reduce the number of tribunal claims brought by 2,000 a year. However, there is scepticism as to whether this approach will actually work. Last year, there were about 48,000 unfair dismissal claims brought in total and therefore a reduction by 2,000 is

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unlikely to bring dramatic improvements to the tribunal system.

Secondly, many believe that those disgruntled employees who do not have the requisite qualifying service are more likely to become creative about bringing discrimination or whistleblowing claims instead, for which there is no minimum qualifying period of service.

Additionally, the proposal itself has been argued to be indirectly discriminatory against young people, who are less likely to have 2 years' service. The Government has defended this argument on the basis that the proposal is a proportionate means of achieving a legitimate aim, but it has committed to monitoring the equality impact of the increase as part of its overall assessment of the implementation of the proposals.

Tribunal fees

The Chancellor has announced that new fees for employees wishing to bring claims to the employment tribunal will apply from April 2013. The rates have not been announced but these have been reported to be:

- £250 to lodge a claim; and
- £1,000 to proceed to a full hearing.

These amounts may be higher for claims worth more than £30,000 and unemployed claimants may be granted full or partial exemptions. Fees may also be introduced on a sliding scale dependent on level of salary. Fees will be repaid if the claim is successful, but forfeited if the claimant loses.

These proposals in themselves raise various queries as to what happens to the repayment of fees in the event of settlement, or if a claim is partially successful. How will the value of claim be determined?

Sickness absence

The government has committed to responding to the recommendations contained within Dame Carol Black's recent report Health at work – an independent review of sickness absence with a view to reducing sickness absence and the related cost to both employers and taxpayers. The recommendations within the report include:

- Establishing a new Independent Assessment Service which can provide expert advice on whether and how an employee who has been off for more than 4 weeks can be supported in their return to work;
- Revision of fit notes to consider an individual's capacity to return not only to their own jobs, but work more generally is considered; and
- After a 20-week absence employees should be considered for a job-brokering service that will seek employment opportunities beyond their current employer.

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