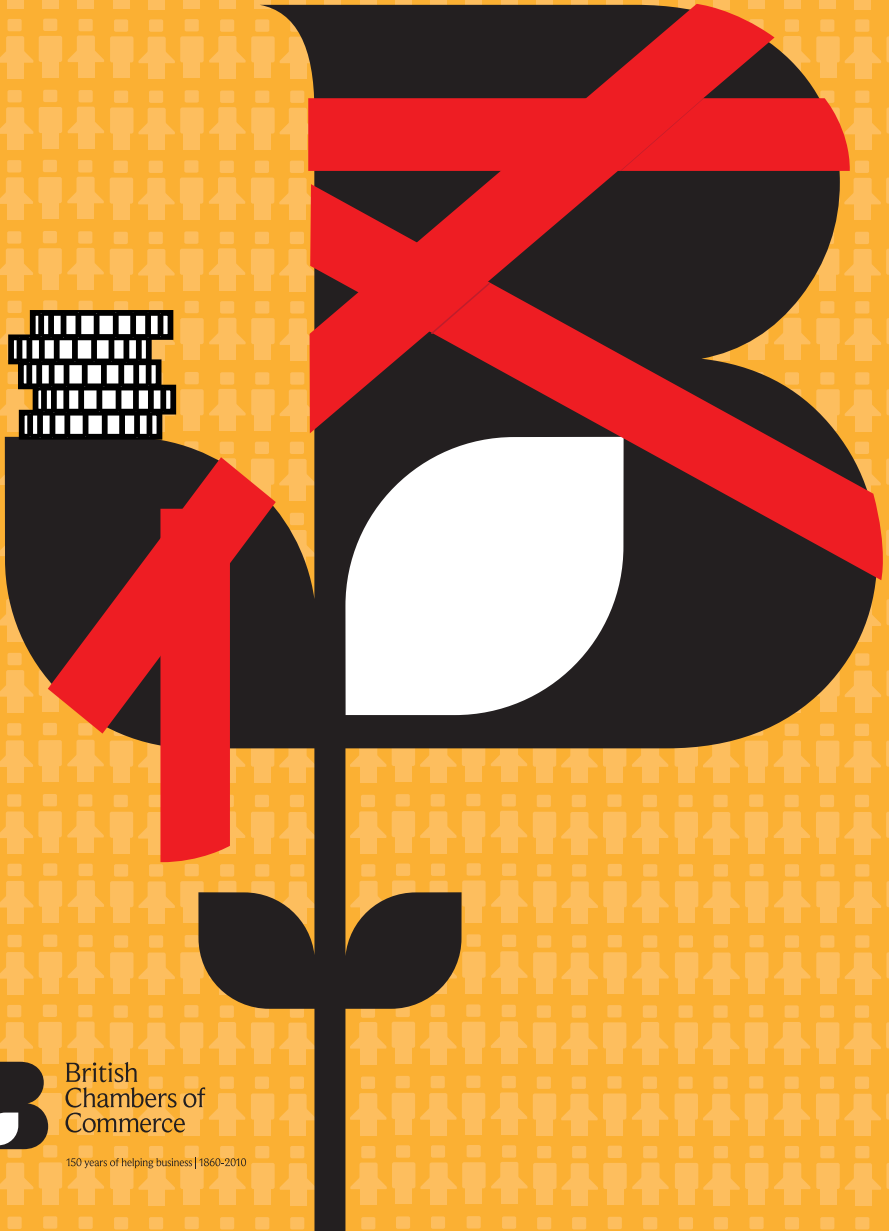


**EMPLOYMENT REGULATION:
UP TO THE JOB?
MARCH 2010**



British
Chambers of
Commerce

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ABOUT US

The British Chambers of Commerce is the national body for a powerful and influential Network of Accredited Chambers of Commerce across the UK; a Network that directly serves not only its member businesses, but the wider business community.

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No one disputes the difficulty of striking an appropriate balance between employer responsibility and the need for employees to take responsibility for their own actions. If an employer behaves unscrupulously, it is critical that there is a mechanism employees can use to gain redress.

Speaking to businesses across the United Kingdom, there is an emerging consensus that employment law is now weighted too far in favour of the employee. Basic protection of employment rights has now been replaced with rights to request, extended time off provisions, and complex laws that neither employers nor employees can understand. Many rights come from EU legislation, which is informed by and aimed at labour markets very different to our own. The result is that the UK, and the EU, are becoming increasingly uncompetitive due to the rising cost of labour.

This report presents a number of ways that employment legislation and the Tribunal system can be rebalanced, resulting in reduced costs, less bureaucracy and improving the competitiveness of the UK economy. Encouraging job creation – and thus wealth creation – must remain the Government's priority as the economic recovery continues. A three year moratorium on the implementation of new employment regulation is crucial to achieving this, as is cancelling the planned 1% rise in employer National Insurance Contributions scheduled for April 2011.

Over the lifetime of the next Parliament, the new Government must commit to less regulation, and crucially, they must also review current employment regulations and the burdens they impose. This report is being launched at our Annual Conference to highlight the importance of employment regulation to British business – and we call on the next Government to act on its clear policy recommendations in 2010 and beyond.

A handwritten signature in black ink, which appears to read 'David S Frost'.

David S Frost

Director General

During late 2009, the British Chambers of Commerce embarked on a series of consultations and focus groups examining businesses views on employment regulations. We also commissioned a leading law firm based in the North West, Brabners Chaffe Street, to provide analysis of the current state of employment legislation in the UK. Freedom of Information requests and a review of academic and survey evidence also inform this report. We discussed the very broad business view that the volume and ever-changing nature of employment law is becoming too big a burden - a recurring theme in this report. Smaller businesses, in particular, are beginning to see employment regulations as a disincentive to taking on staff. For a sole trader, regulations are becoming an almost insurmountable barrier to taking on a first employee.

Chapter One examines how employment law went from the regulation of collective bargaining to individual employment contracts, later evolving into the volume and variety of statutory rights afforded to employees today. The role of the EU is also reviewed.

Using case studies, Chapter Two analyses areas where businesses have had the most difficulty understanding and complying with employment regulations. It also includes a breakdown of the changes to parental leave legislation in the last ten years, illustrating the piecemeal nature of changes and the sheer volume of new rights that have been created.

The two themes that were repeated in all the focus groups were the complexity of legislative requirements on business and defects within the Employment Tribunal system. Within each of these areas there are sub-topics which we have sought to address, such as the dismissal procedures and remote working in Chapter Three, and Tribunal reporting and the role of Acas in Chapter Four.

The main recommendations are:

Employment Law

- **New employment legislation should not impose process requirements on SMEs.** In many cases, it is the process obligations rather than the substantive rights which cause the most issues. 25.2% of businesses in the UK have less than fifty staff compared to 0.8% which have fifty staff or more.¹ These small businesses with less than fifty staff employ over a third of the workforce, and have the potential to create even more jobs in the right conditions². Parliament should legislate with this critical group of businesses in mind.

¹ BIS Enterprise Directorate 2008. The vast majority of business are sole traders and have no staff at all. To encourage job creation in the UK, it is crucial those people are not put off employing staff by employment regulation.

² BIS Enterprise Directorate 2008. 36.9% of employees in 2008 worked in businesses with less than 50 employees.

- **Employers should not have the same health and safety responsibilities towards remote workers and lone workers as they do towards office based staff.** It is unreasonable to expect employers to be liable for equipment they did not purchase at a location where they are not present. The policy objective of encouraging flexible working would be achieved much more easily if these burdens were removed.
- **Barriers to taking on interns must be broken down.** In order to incentivise businesses to give young people a break and take on interns, a new category of worker should be created, clarifying the legal position of interns.
- **If an employer *reasonably believes* an employee has committed gross misconduct then this should be enough for dismissal.** Employers are too tied down by the current legislation, which fails to support employers in situations where an employee has committed an act not explicitly included in their contract as an example of gross misconduct.

Employment Tribunals

- **A fast track conciliation system for employees claiming less than £3,000.** This ‘fast track system’ would ensure all claims are dealt with within a three month period - an attractive proposition for both the employee and the employer. Any employee that does not wish to use this system would have to explicitly opt out on their ET1 claim form.
- **All claimants that have not received professional advice must go through their ET1 form with Acas before submitting their claim.** This would prevent the many claims with no basis in fact getting into the system and tying up both the employer’s and Tribunal’s time.
- **Tribunal reporting should be restricted in the same way as reporting in criminal courts.** Many organisations fear that salacious reporting means that, win or lose, the employer will suffer reputational damage. This encourages good employers to settle unmeritorious claims.
- **Claimants should have to pay the same fees to launch a claim as in the civil courts.** There would be the same exceptions (i.e. for the unemployed) but the principle should remain that a small charge to access the ET system is appropriate, as it is in the civil courts.

INTRODUCTION

It would be wrong to suggest that employment law is a new phenomenon. In fact, the earliest recorded labour law in the UK, the Ordinance of Labourers, was in 1349. The Black Death had led to a shortage of agricultural workers and there was a fear that this would lead to wage and price inflation. This law prevented landowners from hiring excess workers and required that everyone under 60 should work. It has since been repealed.

It was not until 1824 that Trade Unions were legalised. Following this, most of the rights that workers enjoyed in the nineteenth and twentieth centuries were based on union negotiations. The employment law that we would recognise today emanates from the 1960s, with the Donovan Report and legislation requiring employees to be given contracts of employment and dismissal rights.

THE ROLE OF THE UNIONS

The forerunner to the Unions were the guilds which, like the Ordinance of Labourers in 1349, sought to control wages and prices by restricting the supply of workers and apprentices to particular industries. The Masters and Servants Act in 1823 exemplified the feelings of the time which made it a criminal offence for a worker to break their contract but only a civil offence for an employer to break the contract. The repeal of this Act in 1867 marked the end of the involvement of criminal law in the employment relationship.

The Amalgamated Society of Engineers was established in 1850 to provide benefits to its members in case of sickness, unemployment or death. The Government recognised there was a need to protect Union funds and legislated accordingly, culminating in the Trade Union Act 1871.

Unions continued to grow and the establishment of the TUC gave the bodies a means to represent their positions to the government of the day. But the failure of the Great Strike in 1926 demoralised the unions and led to the Disputes and Trade Unions Act which restricted the circumstances in which members could strike to those which were purely concerning trade. Closed Shop agreements were also outlawed³.

Throughout this period, lawmakers and the judiciary concentrated on the unions and the right to strike rather than on individual

³ A closed shop is a business where only unionised employees are allowed to work.

employment rights. This is in contrast to countries such as France where, for example, the right to paid annual leave was legislated for in the 1930s.

1960s TO 1990s

The Contracts of Employment Act 1963 marked a real watershed in employment relations in the UK. This legislation required employers to provide a contract of employment and was swiftly followed by the Redundancy Payments Act 1965, which provided statutory compensation for dismissal for the first time.

NEW LABOUR

1997 marked another turning point in UK labour regulation, perhaps best evidenced by the end of the UK's opt out from the European Social Charter⁴. The focus in the past was on the inequality of bargaining power between employers and employees, and on using legislation to correct this. From 1997, the new approach was to use regulation to move towards full employment by encouraging inclusion of the whole population in the workforce.

Employment law has also been increasingly used as a vehicle to support social security policy. The National Minimum Wage was introduced for workers over 18 for the first time in April 1999. The extension of anti-discrimination regulations⁵, coupled with an increased number of compulsory mechanisms to encourage more people into work, were now seen as imperatives if the goal of full employment was to be reached. Lone mothers and people with disabilities were particularly targeted as groups that may not have been previously categorised as 'unemployed' but who should be encouraged into the workforce⁶.

The net result of this policy approach was a substantial new set of requirements for employers to comply with. These include laws giving part-time and fixed term contract workers the same rights as their full-time permanent counterparts. The introduction of TUPE also gave workers new rights, if the business they worked for changed hands.

This period was also notable for the increases in statutory entitlements and allowances. Minimum statutory holiday increased to

⁴ In 1989 the UK refused to adhere to the "Community Charter of the Fundamental Social Rights of Workers", or the Social Charter as it is more commonly known. All other member states accepted this charter from its inception. The European Commission is required, by law, to follow up on the social charter with legislation to guarantee certain social rights.

⁵ In 2000, part time workers gained the right not to be treated less favourably than full time workers. In 2002, this protection was extended to fixed term workers. Another notable extension came in 2003 when discrimination in employment on the grounds of religion, belief or sexual orientation was outlawed.

⁶ Freedland and Davies (2007), *Towards a Flexible Labour Market*, OUP pg235.

5.6 weeks in April 2009. Ordinary Maternity Leave and Pay applied for 18 weeks when Labour came to power in 1997 and rose twice, with the last increase in April 2007 extending this so to 39 weeks. The National Minimum Wage has also risen every year since 1999, with a 16/17 year old rate introduced in October 2004.

THE ROLE OF THE EU

The EU has had a huge impact on the UK labour market as European law takes precedence over national laws⁷. Employment law is normally implemented using Directives. A Directive is an instruction to member states to adapt their laws to conform to these new requirements. The method the country uses to do this is up to the individual state, but the outcome must be that the member state's laws comply with the Directive. Member states are given a set period of time to comply, normally three years. If a state does not comply within the allotted time, then the EU can bring infringement proceedings against that state in the European Court of Justice.

EU treaties are primary legislation whereas Directives, Regulations, Opinions, Decisions and Recommendations are types of secondary legislation. Many treaty articles are directly effective, either horizontally (can be relied upon in a UK court in a case between two individuals) or vertically (can be relied upon in a UK court in a case an individual has brought against the state). One of the most significant directly effective articles in the employment sphere is Article 141, which states that men and women should get equal pay for work of equal value⁸.

The European Court of Justice (ECJ) has a crucial role. National courts may refer points of EU law to the ECJ under article 234. The decision or opinion issued will then be binding on the national court, both in the specific instance under which it was referred and also in future cases. ECJ referrals from other member states are also binding on UK courts.

⁷ ECJ *Costa v Enel* (case 6/64).

⁸ ECJ *Defrenne v Sabena* (case 43.75).

CHAPTER TWO: BUSINESS ISSUES WITH EMPLOYMENT REGULATION

The central problem this report seeks to address is the difficulty posed to SMEs by the volume and complexity of employment legislation. A corollary of this is that businesses now need professional legal advice if there is a dispute which could end with an Employment Tribunal claim. The reality is that in many cases it will be cheaper to settle with the employee and prevent reputational damage rather than defend the claim. At the extreme end, a FTSE 100 company estimates that each Tribunal claim, won or lost, costs £125,000 to defend in terms of legal costs and management time⁹. A medium sized business member in the West Midlands estimated that every claim brought costs them £15,000 to deal with. Some charities have reported that they feel obliged to settle many cases, if they know that the amount claimed is likely to be less than the cost of defence. As they are funded through charitable donations, and have to account for how those donations are spent, it is very important that they are seen to take the most cost-effective option. Any settlement results in additional cost. This report seeks to address both these elements: how we can simplify the law and how it can become more attractive for an employer to go to Tribunal rather than to settle an unmeritorious claim.

The balance of employment law in the UK has swung too far in favour of the employee. Our reforms aim to encourage personal responsibility, whilst still ensuring that employers offer their employees a range of conditions and rights guaranteed by law.

“As the employer I seem to have more responsibility for a pregnant woman than the father of the child” *West Midlands Business member*

⁹ Business Interview Nov 09. This breaks down as follows: legal fees 30%; cost of a Disciplining and Appeals Manager 20% of a base 100k salary; HR Support 25%; witnesses and witness statements 25%. The company also reported spending over £1million in some case on legal fees alone.

LEGALLY UNCERTAIN LEGISLATION - A CASE STUDY

Employee A swore at his employer and was dismissed on the spot for gross misconduct. However, because swearing was not included in the contract as gross misconduct, the employer was advised to go through the dismissal procedure. The company spent over £2,000 getting legal advice and suspending the employee pending investigation in this case. The employer felt that to have dismissed for gross misconduct, where such procedures are meant to be

unnecessary, would have been too risky for the business. If the law was clearer and more certain, the company may have been able to deal with this without seeking external help.

COST OF DEFENCE - A CASE STUDY

A large hospitality company in the East of England settled a claim for £5,000 due to the overwhelming cost of defending the claim. The case centred on employee A, whose husband came onto the premises and attempted to assault employee B (there was an ongoing issue between the two members of staff). They were advised that it would be difficult to prove employee A had incited her husband to commit this act of violence. Employee A also swore at employee B in front of customers. The employer decided to demote employee A and transfer her to another site. The employee never returned, and claimed constructive dismissal. Part of the settlement deal was that, in return for £5,000, employee A signed a confidentiality clause. Despite this, employee A dined in one of the company's restaurants and left a comment card stating, "thanks for the cash, just enjoying my victory."

👂 I would always get legal advice, however much the employee is claiming for. The issues are too complex for me to deal with internally 🗨️

Leeds based small business owner

SETTLING TO AVOID REPUTATIONAL DAMAGE - A CASE STUDY

A charity found that an employee was giving medical advice to parents of children where she was not qualified to do so. The charity gave her a final written warning, and she was suspended. During her suspension it came to light that she was trying to set up a competing business using the charity's customer list, and she was dismissed. When the employee threatened a Tribunal claim, the charity felt they had no choice but to settle rather than risk damage to their reputation. Cases can currently be reported in the media before they have concluded.

A DYSFUNCTIONAL TRIBUNAL SYSTEM - A CASE STUDY

Two former employees brought a claim against a business for unlawful deduction from wages. They were factory workers on National Minimum Wage and they had not realised that an employer must deduct tax and national insurance contributions. The employer did not realise that there was a time-limit to respond to the two claims and filed a response late, explaining the position. For one claimant, the employer's version of events was accepted, and the employer did not have to make any additional payment. However, the other claimant's case was accepted and the employer was ordered to pay the sum that was claimed for. Due to the low amount that was being claimed, it would have cost the employer more to appeal the decision, so the employer paid the claimant the amount ordered.

PIECEMEAL LEGISLATION - A CASE STUDY OF PARENTAL RIGHTS CHANGES IN THE LAST 10 YEARS

In 1999, the Maternity and Parental Leave regulations introduced an entitlement to unpaid leave for parents with children under five years old. The same year also saw an introduction of entitlements for employees with dependants that allow the employee reasonable time off when necessary, such as in the case of injury or illness.

In 2002, the Maternity and Parental Leave Regulations were amended and extended. Statutory Maternity Leave was increased from 18 weeks to 26 weeks paid leave with a right to take six months unpaid¹⁰. In the same year, the Employment Act 2002 made substantial changes to employment law, and particularly to parental rights. Leave for adoptive parents was also introduced. Fathers now had an entitlement to two weeks paternity leave after the birth of their child, paid at the same rate as Statutory Maternity Pay. Employers were reimbursed by the Government for these payments, with small employers entitled to claim 100% of the cost.

Another change introduced by the Employment Rights Act 2002 was the right to request flexible working by parents with children under the age of five (or disabled children under the age of 18). This did not introduce a right to flexible working, but did create the right for an employee to expect a process, including proper consideration of their request and the right to appeal.

¹⁰ For the extra unpaid leave the mother must have one year's continuous service.

CHAPTER TWO: BUSINESS ISSUES WITH EMPLOYMENT REGULATION

The Work and Families Act 2006 extended the right to request flexible working to include all carers who are caring for a partner, relative or person living with them. Other changes included extending maternity and adoption leave with statutory pay from 26 weeks to 39 weeks. Keep in Touch (KIT) days were also introduced, which allow an employee to spend 10 days either in the workplace or training without losing their entitlement to leave.

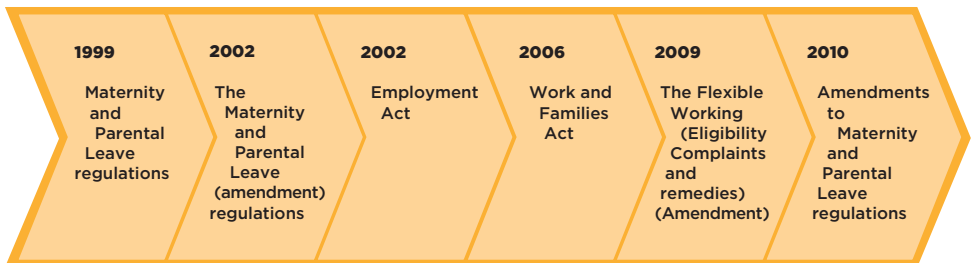
In 2008, the right to request flexible working was extended again to include parents of children up to the age of 16 years old.

In 2009, it was announced that the amendments to the Maternity and Parental Leave regulations which were delayed in 2006 would be brought into force in 2011. This will give fathers the right to share a portion of that leave with the mother, if the mother returns to work. Further changes are expected in the coming years with the Parental Leave and Pregnant Workers Directives at EU level.

Such an approach to legislating has been widely criticised by business and academics: “such piecemeal legislation, applying the small step approach... appears to have little to offer all interested parties but does not fully satisfy any”. For businesses, the problems that this approach causes are clear. Constant changes to the law mean that employers incur more familiarisation costs and that there is more chance a business will get something wrong, as they have not updated their knowledge since the last change in the law. Using old guides, books or previous legal advice also puts businesses at risk of getting it wrong.

¹¹ The Work and Families Act 2006: legislation to improve choice and flexibility? Industrial Law Journal Vol 35 September 2006 pg 272

Parental Leave: 10 years, 6 major pieces of legislation



MACRO-ECONOMIC IMPACT OF EMPLOYMENT REGULATIONS

The debate surrounding employment regulation and its impact on labour market flexibility has resulted in a large volume of academic research. Essentially, the analysis relates to achieving a higher rate of employment, but the contributions to this are many and varied.

For example, regulation can relate to a minimum wage and unemployment, sickness, and retirement benefits, or, like the focus of this report, to working conditions, such as the law surrounding employment protection and health and safety.

Theoretically, a fully efficient and flexible labour market creates no friction between the supply and demand of labour, allowing firms to adapt quickly to societal, economic, or production shocks. The introduction of regulation to the market can create rigidity, which subsequently creates friction, and impacts on the speed at which a company can adapt to change in its economic environment¹².

The debate relating to this has innumerable strands, and quite often depends upon an ideological viewpoint, e.g. whether markets are truly efficient or not. But even beyond this, if there is a belief that increased regulation can improve the functioning of the labour market, there is a question mark hanging over a legislator's ability to produce regulation that is fit for purpose. National Audit Office research casts doubt over whether the Government understands business enough to design effective regulation¹³.

Consequently, regulation can act like a tax – it raises costs and reduces investment – and this is the crux of why it is necessary to simplify employment law where possible. Firms should be given every chance possible to take on staff, and a larger regulatory burden related to the workforce only impedes this. Given the increase in unemployment as a result of the 2008-2009 recession, attempts to simplify are as important now as they have ever been.

¹² DTI, "Employment flexibility and UK regional unemployment: persistence and macroeconomic shocks", 2006, <http://www.berr.gov.uk/files/file36144.pdf>

¹³ NAO, "Complying with regulation - business perceptions survey 2009", 2009, http://www.nao.org.uk/publications/0809/complying_with_regulation.aspx

HEADLINE RECOMMENDATION:

Issue: Small businesses cannot be treated by the law as if they have the same resources as a large company

“ I don't know what legislation affects my business anymore. ”

Small business member with 20 employees

Much of modern employment law confers not only substantive rights to an individual, but also the right to a process. For example, when the right to request flexible working was introduced, workers not only got the right to request but also the right to request in writing, to be replied to in writing, and the right to an appeal process. Small businesses find these obligations very difficult to fulfil, confusing and time-consuming. Many report that it is the process, rather than the right itself, that causes them the greatest difficulty.

RECOMMENDATION

Understandably, many businesses use paperwork to create a trail that can be admissible in Tribunal, but this should not be confused with requirements in legislation that a process should be followed. Businesses manage risk every day; employment law is no different. However, we believe that in most instances it should be a business decision whether to keep a paper-trail, rather than a legislative requirement. It is entirely unfair that a business can conform to the spirit of the law but perhaps miss out an obscure stage in a process and find itself declared guilty at Tribunal.

This was recently recognised in April 2009, when the statutory dispute resolutions procedures were repealed. BCC believes this decision must be reflected across other areas of employment law. The statutory dispute procedures forced employers and employees to follow a rigid three step procedure. If an employer

did not, then the dismissal could be found to be automatically unfair, and compensation levels increased. The new approach allows for more flexibility, and means that there is less risk that an employer could lose on procedural grounds, provided their reason for dismissal was sound. Furthermore, the old rules allowed a Tribunal to increase compensation by up to 50% to an employee if procedure was not followed. The new rules only allow a maximum uplift of 25%. BCC, on the basis of the evidence, recommends that a similar approach be followed across all areas of employment law.

“ Employment law is more about being a good box-ticker than a good boss¹⁴. ” *John Timpson*

DISMISSAL

Issue: The dismissal process takes an unnecessarily long time - especially when both parties know that the result will be a termination of employment

The current laws surrounding dismissal do not work for business. There is much legal uncertainty over what can be done, leading naturally risk-averse businesses to take on a lot of unnecessary cost and worry in a dismissal situation. As well as the uncertainty, business often report that the procedures are far too time consuming when, in some cases, both the employee and employer know that the outcome of the process will be the same: dismissal. Business needs some sort of mechanism that allows a swifter, less risky dismissal to take place, even if that involves a fixed cost.

In dismissal cases, the pendulum has swung too far in favour of the employee, who is often suspended on full pay. There is thus little interest for the employee to promote a speedy investigation. There seems to be little responsibility placed upon the employee to contact their employer regarding the process and dates for investigations, hearings and/or appeals.

¹⁴ Sunday Telegraph, Jan 3rd 2010.

Case Study

A small business with 20 employees in the North West was advised by lawyers to dismiss an employee for a health and safety offence. The employee appealed the decision and the employer posted him a letter with his appeal date. The employee did not turn up to the appeal and claimed they never received the letter due to Royal Mail postal strikes. The employee made no attempt to contact the employer to ask about the progress of the appeal. The lawyers advised the employer to send another letter recorded delivery and to continue paying the employee in full until that new date.

The burden of investigation on an employer can be considerable, and take a very long time to complete in a manner consistent with existing employment regulations. As well as an employer having to suspend the employee on full pay, they also have to incur all the costs of the investigation, which may include external advice, and the pressure on their own time and that of other employees.

Case Study

An elderly wheelchair-bound care home resident complained that they had been restrained in a way that went against the code of practice in the care home. The resident was examined within an hour, and the employee concerned was immediately suspended on full pay. The investigation was scheduled to last 3 weeks and each of the 27 members of staff had to be interviewed by the employer. In the end, the investigation took 5 weeks as the accused employee kept changing the dates she was due to come in. The employee brought in an HR specialist to the meeting who took control of the proceedings. All the employer felt able to do was issue a first written warning, despite his concern for the safety of the other residents.

There are already some mechanisms that an employer may legitimately use to speed up the process of dismissal, including Compromise Agreements and the Acas Code of Practice introduced in April 2009. However, Compromise Agreements are complex legal documents which require the employer to get specialist advice and also to pay for the employee to get specialist advice.

RECOMMENDATION

To assist SMEs who do not have the time, money or knowledge to utilise a Compromise Agreement, there should be a statutory 'fast-track' dismissal procedure where an employee is paid a fixed amount and their contract is terminated. An employee would not have to consent to the 'fast-track', as they do when a Compromise Agreement is used. Therefore, the amount payable is akin to compensation for breach of contract. We would suggest this amount should be the equivalent pay to the number of months the employee has been in employment, up to six months. Therefore the maximum payment would be six month's wages.

This statutory procedure would be simpler and more legally certain than Compromise Agreements and the compensation level significant enough to be fair to employees. This route would not replace any of the aforementioned dismissal routes.

Issue - The law governing gross misconduct is too inflexible for employers

Case Study

A security guard left his post unattended and was dismissed with no notice for gross misconduct. He claimed for unfair dismissal in an Employment Tribunal on the basis that leaving a post unattended was not defined as gross misconduct in the employment contract. Even though the judge concluded that the claimant was 60% to blame, he still found in favour of the employee and awarded compensation to him.

CHAPTER THREE: EMPLOYMENT LEGISLATION - RECOMMENDATIONS

Whilst it is important that employees are protected from employers firing at will, in genuine cases of gross misconduct the law is too inflexible. Although it is true that clever drafting of an employment contract can mitigate the risk to employers to some extent, for the many businesses that use standard form contracts this is not an option¹⁵. It is also extremely difficult, perhaps impossible, to list all actions which an employer may deem as gross misconduct. Many of these actions may only come to light once one employee has committed them.

The law in this area is guided by both legislation and case law. In *British Home Stores v Burchell*¹⁶, three tests were laid out which an employer must pass if the employee is to be found guilty of gross misconduct:

- At the time of dismissal, the employer must have believed the employee to be guilty of misconduct;
- At the time of dismissal, the employer must have reasonable grounds for that belief; and
- A reasonable investigation must have been carried out to inform this belief.

However, it is clear from the case study above and from numerous examples uncovered in our focus groups that these principles are not being correctly interpreted by the Tribunals, and that they are still, in many cases, relying on express contract terms.

RECOMMENDATION

The law should be changed to allow employers to dismiss with no notice on grounds of gross misconduct if the employer *reasonably believes* that their employees' actions constituted gross misconduct. This affords protection both to the employee (as there is a reasonableness¹⁷ test), and also the employer (as the test is subjective¹⁸) in such cases. In practice, this would mean enshrining the Burchell test in statute and providing better guidance to the Employment Tribunal Service on its use.

¹⁵ The standard contract on businesslink.gov.uk is one of the site's most popular documents.

¹⁶ *British Home Stores Ltd v Burchell* 1978.

¹⁷ A pure reasonableness test is an objective test based on whether the defendant has reached the standard of behaviour that the 'reasonable' person would. However, the reasonable person must also have the characteristics of the defendant. E.g. if the defendant was disabled then they would be held to the standard of a reasonable disabled person.

¹⁸ Including belief in the test means that the Tribunal would have to look at whether a reasonable person would believe that they were doing the right thing. This would involve looking closely at the defendant, rather than merely holding their behaviour up to an imaginary reasonable person.

FAMILY FRIENDLY WORKING

Issue - Legislation surrounding remote workers is too burdensome and runs counter to the policy objective to increase flexible working opportunities

Flexible working is a crucial part of the modern economy. The UK Government has legislated to increase flexible working by formalising the right to request flexible working in statute. With new technology, remote working has become even more attractive to businesses. For example, BT's flexible working package promises to reduce the property requirements of a business, a huge cost saving. Westminster City Council reduced its property costs by 30% by following the programme¹⁹.

However, there still remain many concerns for smaller businesses looking to allow their staff to work remotely or from home, particularly regarding health and safety. The current legal position is that, "you have the same responsibilities for ensuring the health and safety of home workers as you would for staff based at your premises²⁰." This means carrying out a risk assessment on a worker's home; keeping a record of accidents; making sure there are no dangerous obstructions or cables; and ensuring that the level of lighting and glare is safe. Furthermore, if the worker normally works alone then the employer has even more obligations to comply with as they are termed a 'lone worker'. For businesses with limited resources these hurdles are almost impossible to meet in full. The Government is meant to be committed to helping more people into work by eliminating barriers to flexible working, but these regulations place far too much risk and administrative burden on the employer.

National Minimum Wage (NMW) legislation regarding home workers also puts too much risk on to the employer and increases the administrative burden of allowing an employee to work from home. Employers have two options for these workers: either tracking their hours and paying them an hourly rate, or creating a 'fair piece rate'.

An employer has to calculate the Mean Hourly Output Rate (MHOR) by testing either all their employees or a representative sample of their employees to assess the average speed. It is important that if a sample is chosen that not only the fastest workers are picked for the test. Both methods are time intensive and increase the risk that

¹⁹ http://www.global.services.bt.com/LeafAction.do?Record=Flexible_Working_Services_solutions_gbl_en-gb&Context=solutions&chapterKey=2

²⁰ <http://www.businesslink.gov.uk/bdotg/action/detail?type=RESOURCES&itemId=1074447795>

an employer may be found to be paying below NMW. If an employer is taken to Employment Tribunal under National Minimum Wage Act 1998 then the onus is on them to prove that they were paying the correct rate.

Once the MHOR is established then this must be divided by 1.2 and then that figure divided into the NMW. This establishes the fair piece rate. Then, for each worker, this rate must be multiplied by the number of pieces they have worked on. Furthermore, every year that the NMW rises, the calculations have to be worked out again. This is a very complex and potentially risky calculation for employers to have to undertake - and results in a fast worker being penalised by the average rate.

Although home working is not for everybody, it can be the only viable alternative to unemployment for those with caring responsibilities, disabilities or people who have retired. Legislation in this area must be rebalanced so that the employee takes on more responsibility, and so that employers are not penalised for offering a more flexible working system.

RECOMMENDATION

Home-workers should be responsible for their own health and safety in their own property. The only aspect that employers should retain responsibility for is the testing, certifying and maintaining of electrical equipment provided by the business. We believe that this strikes the right balance between employer and personal responsibility and will encourage more companies to find innovative flexible working solutions that benefit both the business and the employee. This will free up employers to spend more time on core business activity. The Health and Safety at Work etc Act 1974 should be amended to take home-workers outside the scope of the regulations discussed.

RECOMMENDATION

Employers should be permitted to pay home-workers by the piece without having to work out complex NMW formulae and/or tracking their hours. It is inappropriate for piecework to be under the NMW framework.

Issue - Maternity legislation is too complex

Businesses find maternity regulation very burdensome as it is constantly evolving, costly and if an employer gets it wrong, they face a real risk of a discrimination claim being made against them, with uncapped damages. There are currently 17 pieces of legislation relating to maternity leave and pay.

RECOMMENDATION

A new Maternity Act must be created to consolidate the law in this area, but should not be used to extend further rights. The Equality Bill was a good example of codifying different laws into one piece of legislation, but it also extended the law in certain areas and included new clauses on areas never previously legislated for. During the lifetime of next Parliament, a new Maternity Act must be a priority, but there must be a commitment for the substance to remain the same. This will enable guidance to be simpler and more consistent, saving businesses time and money, especially if the employer has never had a pregnant worker before.

THE STATUS OF WORKERS

Issue - The legally uncertain employment and tax status of interns hampers the policy objective to increase the number of internships available

The Low Pay Commission (LPC) report in both 2008 and 2009 made comment on whether interns and work experience students should fit under the National Minimum Wage framework. Their view was that better guidance was needed but there are still issues where the law itself is uncertain, vague and presents too much risk to an employer. At a time when the Government has recently launched a Graduate Talent Pool to encourage employers to offer internships, it seems contrary to their policy objective that there should be so many barriers and risks in the way of businesses offering formal and informal work experience.

Clever contract wording will not help indemnify an employer in this situation; just because a contract specifies that a work experience placement is 'volunteering' does not mean a Tribunal will see it this way. In fact, if there are mutual obligations and a set pattern of

CHAPTER THREE: EMPLOYMENT LEGISLATION - RECOMMENDATIONS

working, then it is highly likely that the intern will be judged to be a worker and will therefore be entitled to NMW and other rights. They will also accrue annual leave and could be entitled to Statutory Sick Pay (SSP).

However, even if the intern is not deemed to be a worker, then it is still likely that the employer will have obligations towards them through the Working Time Regulations 1998 - particularly with regard to rest breaks and weekly working hours. Interns also must be considered in health and safety policies.

Businesses should also be careful with their recruitment policies for internships. A recent Tribunal case found against a business, London Dreams Motion Pictures Ltd²¹, for not paying NMW to an intern, even though it was advertised as an expenses-only position. When recruiting an intern, businesses also must be careful that they comply with discrimination law.

RECOMMENDATION

In order to incentivise businesses to take on interns, a new category of worker should be created. An intern would be an individual on a contract of no longer than three months' duration, provided with on-the-job training²² and a certificate or reference letter²³ provided at the end of the internship. To prevent abuse, an organisation may not employ an individual intern on an internship contract for 12 months after the original internship ended. A person defined as an intern would not be entitled to employment rights such as National Minimum Wage and statutory holiday payments.

It may be that in the development of an internship category that some minimum pay arrangements, such as covering expenses, are included, as they are for apprentices.

It should be noted that this category would be used by business taking on interns without wanting them to accrue workers' rights (such as NMW, holidays) for three months. For those businesses who do want their interns to be fixed term employees then this route is still open to them.

For businesses who want to take on an intern for longer than three months, this would still be legal, as long as faster the three

²¹ <http://www.bectu.org.uk/news/548>

²² This is also part of the definition of an apprentice.

²³ CIPD's internship charter was launched at the end of 2009 and included a recommendation that a reference letter or certificate be provided. http://www.cipd.co.uk/pr ESSoffice/_articles/230909internshipcharter.htm

months they got the same employment rights and other fixed term workers. In a sense, this would not be much of a change for businesses than the current situation. CIPD²⁴, and many lawyers²⁵, believe that taking on an intern for more than three months, without giving them the rights that come with mutuality of obligation, would open an employer up to Tribunal claims.

Issue - Employers find themselves unfairly liable for checking the immigration status of employees

As illustrated by the case of the Attorney General, Lady Scotland, employers are responsible not only for taking and copying proof that an employee can work in the UK, but also for its veracity. Lady Scotland was fined £5,000 after it emerged her housekeeper had a fake Tongan passport with a fake UK visa stamp inside. The maximum fine for employers is £10,000.

RECOMMENDATION

Employers should have to take a copy of a passport - but that is where their responsibility should end. The obligation to check that the document is genuine must rest with the authorities - as employers lack the expertise to check whether a document is real or forged. The public sector employs substantial numbers of HR professionals. In contrast, most small businesses are owner managed and do not have access to this resource. If the public sector is getting it wrong, this serves to illustrate the complexity of the current system. Employers are not responsible for the control of the UK's borders, and should not face a financial penalty if they are unable to ascertain that documents are inaccurate or forged.

The Immigration Asylum and Nationality Act 2006 must be amended to reflect this and ensure that employers are not being unfairly penalised.

Issue - CRB checks are costly and often unnecessary

Criminal Records Bureau (CRB) checks are important to ensure the safety of children and vulnerable adults. However, individuals applying to work for several employers where CRB checks are

²⁴ http://www.cipd.co.uk/pressoffice/_articles/230909internshipcharter.htm

²⁵ <http://www.personneltoday.com/articles/2009/06/03/50907/get-to-grips-with-internships.html>

necessary, or an individual whose role requires them to work in several organisations, have to apply for a CRB check with each employer. As well as being expensive,²⁶ this can also cause considerable delay before a candidate can actually begin working.

Many businesses will require that their contractors' employees have CRB checks as a contractual term, even if this is not required under law, which pushes up the costs for employers. A notable example of this is in the construction sector where, if work is taking place in a school and is entirely separated from the children, CRB checks are not legally required but many schools will insist upon them anyway.

RECOMMENDATION

The Government should create a central facility where registered employers can access information on individuals' CRB checks without incurring extra fees. As well as reducing costs for businesses, this will also make it easier for employees to find work and transfer between employers. These records would be time limited; we would suggest they are valid for one year.

There will be an initial set-up cost for the Government, but this cost could be offset by an increased fee for a CRB check. These reforms will mean employers have to request fewer checks, so there should still be a net benefit to employers that regularly use CRBs, even if the cost per check increases.

The creation of the Independent Safeguarding Authority (ISA) could provide a useful model. This is a centralised vetting system for those working with children or vulnerable adults and will be continuously updated (unlike a CRB which is currently a snapshot in time). The registration is a one-off fee, so when the employee moves jobs, the new employer does not have to pay for another check. The projected set up costs for this scheme were £16.6 million with operating costs of £17m million per year²⁷. Employers are able to check with the ISA online, or obtain a detailed statement, like an enhanced CRB check currently. This system will run alongside the CRB system; its phase-in began in October 2009.

²⁶ Registration costs £300, plus £5 per additional person. required to countersign the checks. There is then a cost of £26 per standard application and £36 per enhanced application.

²⁷ Impact Assessment http://www.dcsf.gov.uk/ria/assessmentFiles/riaFile_73.pdf

DISCRIMINATION LEGISLATION

Issue - Discrimination questionnaires place a disproportionate burden on business

Employees have the right to serve discrimination questionnaires on their employers and the employer has to respond within eight weeks, otherwise an Employment Tribunal may infer something from this failure. The original intention for these questionnaires was to help an employee decide whether or not to bring a claim. The plan was that this would help avoid claims where there was no merit. However, our research suggests they are now mainly used after a claim has been brought, and are rarely pivotal to the outcome of a case. Many lawyers believe they are used as a 'fishing expedition', rather than to find specific information to strengthen a particular claim. All parties are bound by a duty of disclosure, and so there is nothing crucial to their case that a claimant could have discovered by using a questionnaire that would not have been disclosed in any case.

The burden these questionnaires place on business is significant. Our members' experiences suggest the average disability questionnaire is forty questions and ask the employer to go back five years. One member reported that in one section alone they had been asked to answer one hundred questions²⁸. They also require a full breakdown of all the employees within that period, a particularly significant burden on businesses with high staff turnover. It takes a business between one and seven days to fill in one of these forms, often requiring external legal advice. Owner/managers report that the technical notes accompanying these forms are unhelpful.

RECOMMENDATION

As these questionnaires do not serve the purpose intended, and as they rarely add anything to a claimant's case, they should be abolished entirely. We do not believe this will make it any more difficult for an employee to make a case against an employer. Nor do we believe that more cases will come to Employment Tribunal because the employee could not get the information they were seeking.

²⁸ This was in section 6 of a disability questionnaire.

HEADLINE RECOMMENDATION

Issue - Cases are too costly and take too much time to come to Tribunal

Employers frequently have to wait months for Tribunal cases to be heard, by which time they will have wasted a lot of time and money on the claim - often an amount disproportionate to the claim itself. During the focus groups, some firms reported having to wait over a year for a Tribunal date. Those businesses also stated that this wait time had a direct impact on whether they chose to settle the case or not - with many feeling that the costs incurred meant settlement was the best option. The picture varies considerably nationally depending on the resources available and the number of cases brought (see table below).

For this wait-time to be lowered, some of the strain needs to be taken out of the Tribunal system. We recognise the huge increase in workload the system has seen over the past few years. In 2006/7, a total of 132,600 claims were accepted. The next year this went up to 189,300, and last year the figure was 151,000. Between 2001/2 and 2006/7, the service had to deal with less than 100,000 claims per year²⁹. Tribunals need to be properly resourced in order to cope with this. The budget for the Tribunal Service in 2009/10 is £240m; given the state of the public finances, better value for money must be achieved within this budget³⁰. In April 2009, ACAS launched a free claim conciliation service, which we supported, and should hopefully go some way to alleviating the burden on the system³¹.

Currently employers and employees have to wait an unacceptable length of time for the first hearing of a case. As the months roll on, memories fade and it makes it more difficult for employers to assess whether they will win or lose the case. This in turn makes them more likely to settle rather than to let the case drag on and cause costs to spiral.

The other consideration is morale within the whole team if one staff member or recent employee is making a claim. Furthermore, the longer a case takes to come to a Tribunal, the more likely that the firm will suffer reputational damage, even if is found innocent. An employee may use this as leverage to increase the settlement amount.

²⁹ Employment Tribunal and EAT Statistics (GB) 2008/09.

³⁰ Ministry of Justice Departmental Budget.

³¹ http://www.britishchambers.org.uk/zones/business/press-releases_2/bcc-sheds-light-on-new-employment-regulations.html

Table 1: Median time taken, in weeks, for Claims from Acceptance to First Hearing, for Single Claims and All Claims

	2007/8		2008/9	
	Single Claims	All Claims	Single Claims	All Claims
Midlands	17.4	18.4	17.2	18.7
North East & North West	18.6	19.6	18.2	19.7
Scotland	17.3	17.9	17.7	19.1
Central London	20.2	20.4	19.6	20.7
Greater London & South East	17.6	18.3	19.2	21.1
Wales & South West	18.0	18.7	16.8	17.9
Overall	18.1	19.1	18.1	18.5

Source: ET Central database 4 December 2009

RECOMMENDATION 1

Employers should not have to wait more than 16 weeks for a Tribunal date. No region currently achieves this as a median figure, with London having the highest average wait time of over 20 weeks. 16 weeks is a fair, reasonable and achievable length of time as a maximum amount, should only be necessary in the minority of cases. However, the median average wait should be far lower than that. As the figures in Table 1 show, we believe even the quickest median wait time for single claims, 16.8 weeks in Wales and the South West, is unacceptable.

The BCC accessed this information by making a Freedom of Information request. However, in order to drive standards and increase transparency, the Tribunal Service should report annually on the average wait time in different regions. There should also

be targets to help bring the median wait time down to the lowest possible figure.

RECOMMENDATION 2

The BCC believes that any employee who is making a claim and has not received legal advice must spend time with an Acas advisor going through their claim before submitting their ET1 form³². When submitting the claim form they must include a unique identifying number, provided by Acas, to prove that they have had some professional advice. This will help deal with employees who make a claim with no legal basis, but who tie up the Tribunal system and waste employers' time and money.

Case Study

A claimant sent in an ET1 claim that was nine months out of time³³ with no explanation. A preliminary hearing was convened but the claimant did not turn up. This case cost the employer £3,000.

Case Study

A care worker submitted a claim for unpaid wages against a care home. However, he never worked for the care home, and instead was employed directly by a resident of the home. At a Case Management Discussion, the claimant accepted that he was never employed by the care home and withdrew the claim. The claimant then submitted a second claim for different unpaid wages against the care home. The form was accepted by the ET and was eventually struck out. This case cost the care home £3,000 overall.

³² An ET1 is the form that a claimant uses to lodge a claim against their employer, or former employer.

³³ Most claims must be lodged in an Employment Tribunal no later than 3 months after the alleged incident. All types of claim must be lodged within a specific time frame. This time frame can be extended, in specific circumstance, by a Tribunal judge and this is normally considered in a pre-claim hearing.

RECOMMENDATION 3

The BCC believes that any employee who is claiming less than £3,000 from their employer should have their claim automatically conciliated through Acas. This ‘fast track system’ would ensure that a first hearing date is given within eight weeks - an attractive proposition for both the employee and the employer. Any employee that does not wish to use this system would have to explicitly opt out on their ET1 claim form, and face a longer wait than if they used the fast track service.

This would help clear the backlog in the Tribunal system, and allow more complex and/or high-value cases to be heard more quickly. If this system had been in place for financial year 2008/09, it would have had a significant impact on Tribunal workload. For example, 29.2% of awards in unfair dismissal cases were under £3,000 as were 22.1% of race discrimination claims and 16.7% of sex discrimination cases. More claimants may be encouraged to claim for an award just under this threshold in order to speed up their case. This would be something for the individual to weigh up, and something that could be discussed with their Acas advisor if they have not taken legal advice.

RECOMMENDATION 4

The BCC believes that lay advisors are unnecessary in the Tribunal system. Resources would be better diverted towards professional Acas advisors at an early stage, as per the recommendation above. In 2008/09, lay advisors cost the Tribunal Service £6,990,573³⁴. Each Tribunal should sit with just a Tribunal judge who will be able to decide the case alone, and will be aided by the individual having received some sort of input into their ET1 form. The cases in Tribunal should only be those that are complex, where an individual has opted out of the fast track, and/or where the claim exceeds a value of £3,000.

RECOMMENDATION 5

The BCC believes that there should be a requirement for an ET office to process the administration, including notes of the case and letters to each party, within a set period of time. The longer an employer has to wait, the more cost they incur. If a lot of low value cases are taken out of the Tribunal system, then there should be no excuse for orders being delayed.

³⁴ Ministry of Justice FOI Request 62202.

Case Study

An employee failed to attend the ET preliminary hearing. In her absence, the employment judge made it clear that time limits must be adhered to, and made orders for both the claimant and the respondent. The ET office did not type up and send out the order until after the deadlines that the employment judge imposed had passed.

Case Study

An Employment Tribunal in Yorkshire cancelled two hearings without informing the employer. In both cases, the employer sent a barrister to the Tribunal and was charged £500 for each occasion.

Issue - it is too easy for employees to make unmeritorious, vexatious or disallowed claims

The vast majority of claimants take on no financial risk when making a claim. The maximum award that a Tribunal can make for costs is £25,000, but in reality the awards are much lower. In 2008/09, the median award was £1,100³⁵ and costs were only awarded to the respondent in 265 cases. As the case studies in this report show, it costs the average employer far more than £1,100 to defend a claim.

Court fees should not be used to deter those with genuine grievances from bringing cases but that does not mean there should be no fees at all. There is already a precedent for this in civil proceedings in Small Claims Court, where claimants have to pay court fees unless they fit exceptions, such as being in receipt of certain benefits, being on a low income or if they can prove paying the court fees would involve undue hardship³⁶. There are no such rules in Employment Tribunals although they do have the power³⁷ to order a party to pay a deposit of up to £500 to allow their case to proceed. However, the experience of our lawyers and business members suggests that these powers are rarely used.

³⁵ Employment Tribunal Service statistics 2008/09. The statistics were similar the year before when the media costs award was £1000 and the number of respondents that were awarded costs was 327.

³⁶ http://www.hmccourts-service.gov.uk/courtfinder/forms/ex302_e0907.pdf

³⁷ Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861 schedule 1 rule 18.

RECOMMENDATION

Although many claimants, by the very nature of their claims, would be unemployed and therefore fall under one of the exemptions for costs given in civil proceedings, the rules should still apply. There is no logical reason why costs should be seen as a bar to applicants in an ET and not in a civil court. We accept that this measure will not raise a lot of money. However, for those few claimants that 'chase' claims this could prove to be a deterrent. Perhaps one example is where an individual claims a job advertisement constitutes discrimination, without actually applying for the job. They may put in several claims to different employers at simultaneously, and there is no disincentive in the system against this.

We also believe that more use should be made of the deposit scheme. This would particularly deter those people who may put in a number of claims to different employers at once, perhaps having seen a job advertisement they believe contravenes the law or in the belief that the firms would rather settle than go to Tribunal.

Issue - There are very few restrictions on Tribunal reporting

The reputation of a business can be damaged by employees' evidence at Tribunal, even if it turns out to be fabricated and the employer wins the case. This is because Tribunal cases may be reported at any stage and, as the employee presents first, journalists are able to report salacious accusations, without waiting to hear the employers' rebuttal and the judgement. Even the main media law textbook states, "employment Tribunals provide a large number of good stories³⁸." Cases are often widely reported - especially if the stories centre on allegations of sex discrimination or harassment. For example, on November 11th 2009, it was widely reported³⁹ that Ms Wimmer, a woman making a £4m claim against her former employer, had been with her employer when he had taken a scantily-clad escort into a business meeting. This was reported before the employer had given a reply.

³⁸ Welsh, Greenwood and Banks (2007) *McNae's Essential Law for Journalists*, OUP pg 183.

³⁹ <http://www.telegraph.co.uk/finance/businesslatestnews/6543635/City-executive-Jordan-Wimmer-believed-boss-had-hired-a-Russian-hit-man-Tribunal-told.html>

RECOMMENDATION

In the same way that there are limitations on the reporting of criminal cases, Tribunal cases should also be subject to media restraint. Journalists should not be able to report on a case until the Tribunal has reached judgement. This will mean that innocent employers who go to Tribunal are at less risk of reputational damage.

ACTION REQUIRED

The law in this area should be amended to reflect the restrictions on criminal law reporting in the Contempt of Court Act 1981.

Issue - Without immediate knowledge of what remedy the claimant is seeking, employers cannot balance risk

Currently it is only optional for an employee to answer 'What compensation or remedy are you seeking?' on the original claim form (ET1 form). A full statement of loss does not have to be provided until later in the process. Employers find it difficult to assess whether it would be more cost effective to settle the case if they do not know how much the employee is planning to claim in compensation. If the amount is small, it may well cost more for the employer to get initial legal advice and take time out from running their business than it would to settle the claim. However, employers do not have this information early enough.

RECOMMENDATIONS

A statement of loss should have to be filed at the same time as the ET1 claim form. This would allow employers to make a proper assessment of cost and risk and act accordingly.

Issue - Serial litigants

🗣️ My biggest concern in my job is where a claim may be coming from 🗣️

HR Director, construction 1000+ employees

A minority of people use the Tribunal system frequently to try and extort money from employers. These claimants may have made claims that run into the hundreds, yet there is currently no mechanism to track these people and their claims. Due to the high cost of defending a Tribunal claim, serial litigants know that the mere threat of an action may result in settlement, and use this to their advantage.

A recent example of a serial litigant was flagged up by the Sunday Times newspaper⁴⁰. They reported that one man had made over sixty claims for age discrimination against businesses that used the words 'school leaver' or 'recent graduate' in job advertisements. Although the law is meant to protect businesses from such speculative claims⁴¹, many firms settled without going to Tribunal as they believed this was the most cost-effective option. In other words, the risk of going to Tribunal, in terms of both money and reputational damage, was too great.

RECOMMENDATIONS

Currently the only personal details asked for on an ET1 form are name, date of birth and communication details. National Insurance (NI) numbers are a useful unique identifier and would allow the Tribunal system to easily identify serial litigants, without imposing a new burden by giving each claimant a unique reference number. This system would flag those making a large number of claims and only be used to identify and deter those who have made a suspicious number of claims within a given period.

ACTION REQUIRED

ET1 forms should be amended to require claimants to give their NI number, and the Tribunal service should have a responsibility to monitor those making a suspiciously large number of claims.

⁴⁰ Sunday Times
February 7th 2010 pg5.

⁴¹ It is not enough for a person just to see an advert, they have to have done more than that to have been discriminated against.

This report has listed a number of recommendations on various aspects of employment law, from health and safety to national minimum wage to discrimination legislation. Implementation of these will take time and involve many Departments. Parliamentary time will also be needed to amend different pieces of primary legislation.

The proposals for reforming the Tribunal Service are easier to realise as a package than the legislative recommendations. We believe that these reforms are urgent and the next Government should undertake to make these changes as a priority. Many of the costs incurred by business because they settle unmeritorious claims, or take expensive legal advice to mitigate risk, could be reduced if the Tribunal system worked better. We believe these reforms would expedite the process for both sides and result in a fairer, quicker system to resolve disputes.

The problems presented in Chapter Two will not be remedied merely by simplifying legislation already implemented. The British Chambers of Commerce employment law timeline, published in January 2010, identified £25.6 billion in costs facing the private sector between 2010-2014 from various changes to employment law (such as the Agency Workers Directive and the Equality Bill) as well as the planned 1% rise in National Insurance Contributions. If this burden is not reduced then it will severely damage the ability of business to create jobs as the economy recovers from recession.

Two particular changes in the pipeline should be cancelled immediately: the Government amendment to the Equality Bill which allows claims for dual discrimination (clause 14), and any plans for substantive changes to the Default Retirement Age (DRA). Dual discrimination muddies the waters of discrimination law and wider employment legislation to an unacceptable extent, and is an entirely disproportionate policy response. The Government Impact Assessment itself states only five extra people will benefit from the legislation per year.

There must also be a commitment to keep the DRA. The Default Retirement Age should rise in tandem with the announced changes to State Pension Age, but the principle of the DRA must be

maintained to allow businesses to plan and effectively manage the performance of older workers.

There must be a commitment by Government not to impose any new process obligations on businesses, which are entirely inappropriate for small businesses in particular. We are also calling for a three year moratorium on the implementation of new employment legislation, to prevent the costs previously identified increasing further. The UK Government should push for an EU wide moratorium, and ensure that any future European legislation takes into account the characteristics of the UK labour market.



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