Employment Law Reforms – changes now in force

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On 29 July 2013 the changes to the Employment Tribunal Rules of Procedure and new sections of the Enterprise and Regulatory Reform Act 2013 came into force introducing a number of important changes.

Tribunal fees

Fees are only payable for claims which have been commenced on or after 29 July 2013. The fees we discussed in our 7 January e-alert are now payable by a claimant to issue a claim or for a full merits hearing. To re-cap, in single claimant claims, Type A or lower value claims (e.g. unpaid wages, redundancy payments and unpaid notice) the fee to issue a claim will be £160 with a hearing fee of £230 (total £390). Type B claims (e.g. unfair dismissal, discrimination and whistleblowing) will be subject to an issue fee of £250 and a hearing fee of £950 (total £1,200).

An application to dismiss a claim following settlement or withdrawal will cost £60; holding a judicial mediation will cost £600 (payable by the employer) and making a breach of contract counter-claim will cost £160 (payable by the employer).

In the Employment Appeal Tribunal (EAT) claims are now subject to an appeal fee of £400 and a hearing fee of £1,200. The EAT has the power to order the unsuccessful party to reimburse fees paid by the successful party.

Remission of fees is available depending on the claimant's financial circumstances. Claimants can apply for full or part remission based on their receipt of certain benefits, their annual gross income and their monthly net disposable income (if the employee has a partner then their combined income will be considered). The 3 month time limit for bringing a claim has not changed and respondents will not be informed when the full fee has been paid. This means that it may be more difficult to be sure at the 3 month deadline whether a claim has been successfully issued or not. Therefore our advice is to retain papers etc for longer than was previously the case, as you may only find out about a claim some months later.

Tribunal rules

The new rules are intended to be easier to read and use and add more flexibility but they also introduce some substantive changes:

Making a claim

Employees now have to detail the compensation or remedy they are seeking in their ET1. This is intended to assist settlement discussions. The Tribunal can also reject all or part of a claim if it is in a form which "cannot sensibly be responded to".

Response: No Automatic Default Judgment

Application for a default judgment if an ET3 is not received within the relevant time limit will now be necessary. Default judgments will not be automatic.

Sifting

The claim and response will be considered by an employment judge at an initial sifting stage to identify claims with no reasonable prospect of success, which can be struck out in full or in part. This power may have little effect in practice as it may be difficult to make such an assessment based on the papers alone. It is advisable when submitting a response to direct the Employment Judge to any points that may be relevant to the sifting stage.

Preliminary hearings

Case management discussions and pre-hearing reviews have been combined into what are now called preliminary hearings. Both case management directions and substantive preliminary issues may be determined at the preliminary hearings. More preparation will be necessary earlier in the litigation process, to prepare for more issues being covered at a preliminary hearing. Judges can also direct that a preliminary hearing may be treated as a final hearing although this is likely to be rare.

Withdrawal

Respondents no longer need to make an application to dismiss a claim when the claimant has withdrawn the claim or part of it (e.g. as part of a settlement). The tribunal will instead issue a judgment formally dismissing the claim unless the tribunal believes it is not in the interests of justice, or the claimant reserves the right to bring a further claim against the respondent and the tribunal is satisfied there is a legitimate reason for doing so.

Costs

Costs can be ordered against employers if their response had no reasonable prospect of success. The merits of defending a case will therefore be even more important.

Limit of unfair dismissal

The new unfair dismissal cap is the lower of £74,200 or one year's gross pay. The new cap will apply to dismissals with an effective date of termination on or after 29 July 2013.

The £74,200 maximum will be subject to its annual change, which will take effect from 6 April 2014 (previously it changed on 1 February each year).

Pre-termination negotiations

Employers can enter into confidential pre-termination negotiations. Evidence of the negotiations will now be inadmissible as evidence in unfair dismissal claims regardless of whether a dispute exists. Such discussions are akin to without prejudice (WP) conversations but the need for a dispute prior to having a WP conversation is not required. Pre termination discussions should not be used if there is a discrimination or whistleblowing angle. WP is still needed in such situations. The protection also does not apply if there has been "improper behaviour." A reasonable period must be allowed for consideration of an offer with a minimum "cooling off" period of 10 days.

Settlement agreements

Compromise agreements and compromise contracts have been renamed as "settlement agreements" in all relevant pieces of primary legislation. There is also a new statutory ACAS code of practice on settlement agreements in force. A more detailed note will follow.

A more detailed note will follow on pre-termination negotiations and settlement agreements.

Whistleblowing

As of 25 June 2013 any qualifying disclosure must now be in the public interest to give the whistleblower protection. In order to be in the public interest, the disclosure has to affect or have a potential to affect a class of people. Disclosures no longer need to be made in "good faith." However, where disclosure is made out of malice or for personal gain, tribunals will have the power to reduce compensation by up to 25%. Employers should also note they will be liable for a detriment caused to an employee by another employee, regardless of their seniority. We anticipate that whistleblowing claims will reduce as a result of this change.

Employee shareholders

On 25 April 2013 Royal Assent was given to provisions allowing employees to become employee shareholders with a minimum allotment of £2000 worth of shares in exchange for sacrificing some of their employment rights, including the right to bring a claim for unfair dismissal and the right to a statutory redundancy payment. The provisions will come into force on 1 September 2013.

We can provide further advice on any of the above, please contact:

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