

Workplace Disputes: A change in approach

In this brief guide to “Resolving Workplace Disputes: A Consultation” we set out some of the key proposals being put forward and the likely repercussions for employers. Nothing here is intended or should be understood as a substitute for taking legal advice.

Introduction

On 27 January 2011 the government announced steps towards a comprehensive review of employment laws in England and Wales, opening the “Resolving Workplace Disputes” consultation. The focus of the consultation was to implement changes to the Employment Tribunal system which the government hopes will make the process more efficient, effective and less stressful. The proposals are driven by a spike in Tribunal claims, which rose 56% between 2009 and 2010, and the costs implications for small businesses defending claims.

The Proposals

The proposals contained in the consultation document are wide reaching, having an effect on the procedural framework of the Tribunal and with the idea of introducing fees and financial penalties on both parties being mooted. Details of the main proposals include:

- Extending the qualifying period for unfair dismissal claims
- Encouraging parties to resolve disputes as early as possible
- Tackling weak and vexatious claims
- Introducing fees for issuing claims
- Financial penalties on employers

The government’s view is that the proposals will provide employers with more confidence to employ staff and to build long lasting relationships without fear of legal claims, helping businesses to grow in what are difficult financial times.



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Contents

Cuts and consultation

- Introduction
- The proposals
- Extending the qualifying period for unfair dismissal claims
- Encouraging parties to resolve disputes as early as possible
- Fees and financial penalties
- Conclusion

Case law update

- Hashman -v- Milton Park (Dorset) Ltd t/a Orchard Park
- Locke v Candy & Candy Ltd

Firm news

- Focus on Nick Fry - Solicitor

Seminars and lectures

New employment law microsite launched

“The focus was to implement changes to the system which the government hopes will make the process more efficient, effective and less stressful.”

Extending the qualifying period for unfair dismissal claims

One of the most significant proposals is to extend the qualifying period for employees bringing claims for unfair dismissal before the Tribunal from the current one year's continuous employment to two years.

The introduction of such a proposal will undoubtedly reduce the time and resources of companies facing such claims by restricting the pool of employees eligible to bring a claim. This does not however mean that there will necessarily be a direct correlation in the number of claims decreasing as there is a genuine concern that claims will be brought under other heads of claim, such as discrimination law and whistle blowing legislation which do not have the same strict qualifying period. The rationale for this change is that the extension of the qualifying period will give employers and employees a better chance to establish a strong working relationship,

“Employers liability will not however be extended further to paying the employees' legal costs.”

incentivising parties to resolve disputes without the threat of litigation. Whilst this may be true of some cases, in others, it will not always be possible for an employer to have identified whether there are performance or capability issues within the first year of employment. If this is true of the first year of employment, it may be equally true of the subsequent year. In such circumstances, there may be a question as to what practical difference this additional time will mean to employers.

Encouraging parties to resolve disputes as early as possible

Under the current regime, the Advisory, Conciliation and Arbitration Service (ACAS) becomes involved in a claim after it has been issued in an attempt to mediate between the parties. The proposals would see the involvement of ACAS at an earlier stage in proceedings, with the introduction of pre-claim conciliation i.e. prior to any claim being issued at the Employment Tribunal.

There are advantages and disadvantages to these proposals. If parties enter into the pre-claim conciliation process, successfully resolving their dispute, there will be welcome savings both in terms of time, cost and stress associated with resolving workplace disputes. However, where the conciliation process is

unsuccessful and matters progress to the Tribunal, the process will have the effect of further drawing out an already time consuming process and increasing the financial pressures on the parties to the dispute.

Furthermore, it is important to note that a Claimant employee cannot be compelled to submit to the pre-claim conciliation process and may opt to bypass this process and issue proceedings. A saving grace, perhaps, for employers seeking to avoid defending multiple weak or vexatious claims is that those Claimants choosing to avoid the pre-claim conciliation process will be expected to better particularise their case from the outset in the claim form. This should assist judges in assessing the viability of a claim at the earliest possible opportunity, with a view to striking out weak claims where necessary.

Fees and financial penalties

The Employment Tribunal is currently a no costs regime. This means that the losing party will not be required to pay the winning parties costs at the end of the case and each party bears their own costs. Whilst the consultation document does not envisage changing the costs regime of the Tribunal, there are proposals which will have costs implications for Claimants and Respondents alike.

The first proposal is to introduce issue fees. As a result, any Claimant seeking to bring a claim would be required to pay a fee to the Tribunal when issuing the claim and at other milestones throughout the process. Whilst no detail has been given as to the level of fees, if introduced, charging fees may act as a disincentive to employees seeking to bring claims, particularly weak and vexatious claims.

However, it is important to note that where an employee is able and willing to pay the issue fees and obtains a positive judgment in their favour, the proposals suggest that the Respondent employer will be liable for reimbursing the employee with the fees. Employers' liability will not however be extended further to paying the employees' legal costs.

In addition to the introduction of issue fees, it is envisaged that financial penalties will be introduced against employers who breach their employee rights. It is hoped that a regime of fining employers up to £5,000 will act as an incentive for employers to ensure that their work-based strategies comply with the current employment law obligations. Both these proposals have the potential to increase costs of employers seeking to defend claims where ultimately they are unsuccessful in doing so.



Key contact

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Case law update

This update highlights a few important developments in employment law over the last quarter or so.

The case summaries below are not intended as legal advice but rather as a means of flagging up volatile issues.

Should you have any situations which raise similar questions or problems, please contact us for further, more detailed advice.

Anti fox-hunting and animal welfare beliefs qualify for protection under religion or beliefs legislation.

Hashman -v- Milton Park (Dorset) Ltd t/a Orchard Park

The Employment Equality (Religion or Belief) Regulations 2003 (the Regulations), and later the Equality Act 2010, impose a duty on employers not to subject employees to direct discrimination, indirect discrimination, victimisation or harassment on the grounds of their religion, religious beliefs or their philosophical beliefs. The lack of clarity in the Regulations on what constitutes a philosophical belief has led to case law bridging the gap.

The landmark decision in the case of Grainger plc & others -v- Nicholson, a case also conducted by Bindmans' employment Partner Shah Qureshi, clarified that views other than purely religious ones can, under certain circumstances, warrant the protection of the Regulations and the law.

Shah Qureshi has expanded on this landmark decision in his recent case acting on behalf of Mr Joe Hashman (JH). JH, a vegan with strong involvement in the anti-hunt and anti hare-coursing movement, was dismissed for his role as a gardener at Orchard Park garden centre (the centre). The centre argued that he was made redundant as the post was only temporary and would be discontinued as not commercially viable. JH argued that he was dismissed after the centre shareholders and owners, keen and active hunt supporters, found out about his past as a hunt saboteur.

A pre hearing review was ordered to decide whether JH's animal rights and anti-hunt views qualify for protection.

The Employment Tribunal's decision was that JH's beliefs did warrant protection under the Regulations. The Judge explained that JH's beliefs were a fundamental and important part of his life as they governed every area of his life from what he ate, what he wore and where he worked. It is important to note the Judge's closing comments however, that his decision was based on the facts presented to him in JH's case and that he did not suggest that all anti-hunt or animal rights views would warrant such protection.

Comment: Employers should be aware that beliefs other than those which fall within the

traditional definition of 'religious beliefs' could potentially be protected by laws governing religious discrimination in the work place.

Payment in lieu of notice need not include bonus

Locke v Candy & Candy Ltd

Mr Locke (L) was employed by Candy & Candy Ltd (CC) as a chartered surveyor from 17 September 2007 at a salary of £200,000 per annum. He had a guaranteed bonus of £40,000 after six months' employment and a further £160,000 after 12 months' employment. His contract stated that he 'must be employed by the company in order to receive the bonus'. The contract also allowed CC to make a payment in lieu of notice (PILON) and provided for garden leave during any period of notice.

During the summer of 2008 L became engaged in a dispute with CC over changes they wanted to make to his contract. CC orally terminated his contract on 7 September 2008 and terminated it in writing on 8 September 2008. CC, as per the terms of the termination letter, paid L 6 months PILON in monthly instalments. CC did not pay L his bonus as he was not employed on 17 September 2008, the date on which his £160,000 bonus would have been due.

L brought a claim in the High Court for payment of the bonus or damages for breach of contract as he argued that he would have received the bonus had he remained in employment until the end of his notice period rather than being put on garden leave.

The High Court called L's assessment of his entitlement 'strained, unnecessary and inconsistent' and found in favour of CC.

L appealed the decision.

The Court of Appeal upheld the High Court's decision stating that the bonus was not payable where the employee's employment had ceased by the time it would otherwise become due. The Court was however critical of the lack of clarity in CC's contract of employment, particularly in relation to the PILON clause which did not expressly state what was to be included in the payment. It was this lack of clarity that led to L bringing the claim.

Comment: Employers should not underestimate the benefits of a well-drafted and clear contract of employment. CC was saved a costly award against them only because the Court of Appeal chose to read the contract in the round and construe the PILON clause accordingly. A badly drafted contract could easily have tipped the scales in L's favour due to the lack of a clear PILON clause.

Focus on Nick Fry

Newly Qualified Solicitor

Nick was awarded an LLB from the College of Law in 2007.

Nick has always taken a special interest in Employment Law and while studying found time to volunteer for the Mary Ward Legal Advice Centre and the Free Representation Unit, two organisations providing free employment law advice.

Nick joined Bindmans as a paralegal in 2008 and was subsequently recruited as a Trainee Solicitor. He went on to train in the Personal Injury, Clinical Negligence and the Employment Law teams.

On 15 March 2011 Nick was admitted to the Solicitors Roll and now practices as an Assistant Solicitor with Bindmans Employment Law Team. Nick has a wealth of experience assisting



individuals and organisations with employment law issues. He can advise on internal disciplinary and grievance procedures, contracts of employment, redundancy, unfair dismissal, discrimination, whistle blowing, compromise agreements and other employment matters.

At Bindmans Nick has assisted on a number of important cases including two groundbreaking cases concerning philosophical belief discrimination (Grainger plc v Nicholson, and Hashman v Orchard Park Ltd). These cases were widely reported in the national press for setting new precedent.

Nick has contributed to several legal journals and has given presentations on good governance for employers managing internal disputes.

Nick is committed to providing clear, practical legal advice and resolving disputes as effectively and efficiently as possible.

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Visit the new employment law micro-site

In the last newsletter, we wrote about the launch of a new employment micro-site which offers support for professionals and executives, and provide a resource for clients.

The new micro-site is accessible via the main Bindmans' website, under the 'Employment law for executives and professionals' section.

Our solicitors have specialised in championing the rights of employees for years. We have significant experience in this complex area of law, so we understand how stressful employment related issues are. Our solicitors recognise the importance of acting quickly and assertively when dealing with your case.

Whether your concerns are about highlighting wrongdoing, seeking financial compensation, or minimising losses to your future career prospects, we have the skills necessary to fight for you and maximise your prospects of achieving a positive result.

Our services:

- Negotiating and advising on Directors Agreements and Contracts of Employment
- Discrimination on the grounds of your Sex, Race, Age, Sexual Orientation
- Restrictive Covenants, confidentiality agreements and restraints of trade
- Public Interest Disclosure issues and Whistle blowing
- Negotiating severance packages and compromise agreements
- Unfair Dismissal
- Breach of Contract and Wrongful Dismissal claims
- Grievances
- Support and representation during disciplinary and investigatory proceedings
- Representation at the Employment Tribunal, Employment Appeal Tribunal and High Court

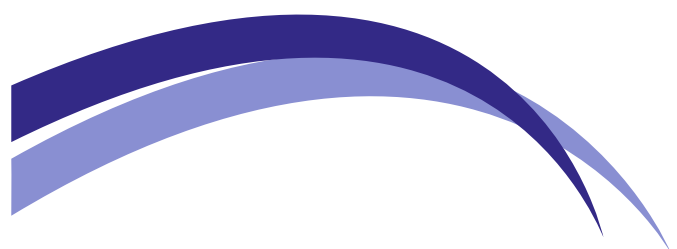
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Seminars and lectures

In order to meet the needs of organisations and companies that endeavour to keep abreast of their duties and obligations as employers the employment department at Bindmans offers a range of seminars and lectures.



These events can be tailored to the specific needs of your organisation and provide an excellent way to improve your knowledge of employment law rights and obligations. Please contact Shah Qureshi if you have any particular training requirements.



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