WHITE & CASE

Insight: Employment & Benefits

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The changing face of Employment Tribunal litigation

Statistics published by the Ministry of Justice show that the Employment Tribunals received 79% (or 9,801) fewer claims in the period October to December 2013 than in the corresponding period in 2012. It is safe to assume that the main reasons for this dramatic drop can be found in the equally dramatic changes that have been, and are being, made in relation to the Tribunal process.

These changes are creating a more employer-friendly business environment, introducing greater obstacles for employees to bring unmeritorious or vexatious claims and reducing the risk to employers when dealing with problematic or underperforming employees. Those employees who may previously have lodged claims merely to inconvenience an employer or force a favourable settlement are now less likely to use the Tribunal system for tactical leverage.

Qualifying periods and pre-litigation steps

The increase in the unfair dismissal qualifying period from one year to two years, means that employees must be employed for a longer period of time before becoming eligible for unfair dismissal protection. This makes it easier for employers to assess and dismiss poor performers. Previously, if employees were given the benefit of the doubt for more than a year, any subsequent dismissal could lead to unfair dismissal complaints. In cases where no qualifying period is required, in particular those of discrimination, the pre-litigation steps that employees had previously relied upon have also been narrowed by the abolition of discrimination questionnaires.

Limit to compensation

The cap on unfair dismissal compensation has also changed so that it is now the lower of one year's salary or the prescribed maximum (currently £76,574). For lower-earners, there may be less appetite for incurring the time and costs of bringing a claim where their maximum compensation will be capped at their annual salary.

Pre-termination negotiations and ACAS

In an attempt to discourage parties from Tribunal litigation, changes have been introduced to encourage early resolution of disputes. Any pre-termination negotiations between an employer and an employee (meaning any offer of or discussions about settlement terms) are inadmissible in unfair dismissal proceedings, unless there is improper behaviour. This gives employers more comfort in making settlement offers where there is no "existing dispute" to trigger without prejudice privilege. In practice, this will assist in performance

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related dismissals which are often difficult to justify as "fair" as they may not fall squarely within the meaning of "conduct" or "capability".

Additionally, a new system of pre-claim conciliation becomes mandatory from 6 May 2014. Before lodging a claim, a prospective claimant will need to notify ACAS, the Government's industrial relations service, which will seek to initiate conciliation. If the parties do not wish to participate in conciliation or a settlement cannot be reached, ACAS will issue a certificate to this effect. A Tribunal claim cannot be lodged until the claimant has this certificate. Such changes are likely to encourage parties to consider pre-litigation settlement more carefully.

Employment Tribunal process

New Tribunal rules of procedure and fees came into force on 29 July 2013. Claimants pay an issue fee of £160 or £250 when lodging a claim, and a hearing fee of £230 or £950. Previously the Tribunal process could fairly be termed "free" for employees. The trade union, Unison, has challenged the introduction of such fees on the ground that it makes it "*virtually impossible*" for individuals to exercise rights conferred by EU law. While the High Court dismissed this challenge as having been made prematurely, the door has been left open for future challenge.

Once the issue fee is paid, Tribunals have the power to reject a claimant's ET1 if it is in a form which "*cannot sensibly be responded to*". Quite what this means is unclear but, on a common-sense reading, this will undoubtedly have the greatest impact on unrepresented claimants who may have poor literacy skills and be unable to articulate the legal basis for their claim. Completing and submitting claim forms properly increases the likelihood of prospective claimants incurring legal costs upfront. This may appear unfair for those who have genuine claims but do not have the financial resources to fund these costs. On the other hand, many employers feel relief that individuals are required to properly set out their claim as this reduces the risk of them abusing the purpose of the Tribunal regime.

If an ET1 is accepted, it will then be subject to a new sift stage, which gives a Tribunal the power to strike out a claim in full or in part where the judge considers the claim has no reasonable prospects of success or the Tribunal lacks jurisdiction. The facts and merits of a case will therefore be assessed at a much earlier stage than previously, with the objective being to strike out unmeritorious claims and deter employees from bringing disingenuous claims solely for tactical reasons. It remains to be seen how robust Tribunals will be in exercising these powers, particularly in cases of complex claims involving allegations of discrimination or whistleblowing, where the hearing of evidence will be crucial to determining prospects of success.

While these changes make it harder for employees to bring claims, employers are not entirely positively impacted. Employers who lose at Tribunal may now be subject to financial penalties of up to £5,000 where there are aggravating factors. Although not substantial sums, the prospect of such fines, and potentially being required to pay the claimant's Tribunal fees, may be enough to deter smaller employers from vigorously defending claims all the way to hearing solely to pressurise employees into withdrawing or accepting a lower settlement.

Comment

Employees must wait longer to qualify for unfair dismissal protection and are more likely to need legal representation at an early stage to reduce the risk of their ET1 being rejected or their claim being struck out at the sift stage. This will inevitably result in employees incurring greater costs upfront and so employees will weigh this against the award they could receive if successful. This may lead to an increase in data subject access requests in place of discrimination questionnaires, and potentially, discrimination and whistleblowing claims, for which no qualifying period of service is required and for which compensation is uncapped.

In practice, it will be easier for employers to deal with difficult or underperforming employees as the risk of potential liability has been mitigated by the changes. The increased qualifying period gives employers more time to assess an employee's performance and suitability for a role. The introduction of pre-termination negotiations and mandatory conciliation enables employers to have open and frank discussions about performance and retirement plans, and negotiate the early exit of employees who may not be meeting the standards expected. This will be especially relevant when dealing with the removal of senior executives or managers for business related reasons. The change to the cap on unfair dismissal compensation also means that, when dealing with lower earners, employers will not be faced with the prospect of paying compensation above an employee's annual salary.

That is not to say that employers should not still strive for a fair dismissal. Where an employer has genuine concerns about an employee's conduct or performance, these changes should not be used as a substitute for conducting a formal process.