

Employment Law: What to expect in 2012

2012 promises significant changes for employers and employees alike. In Autumn 2011, the Government proposed major changes to employment law. Two of the more significant proposals are an increase in the qualifying period for unfair dismissal claims and a wholesale change to Employment Tribunal practices. The aim of the changes is to encourage employee recruitment and to cut red tape for businesses. We set out below some key matters of which you should be aware.

1. 1 February 2012

- **Compensation limits**

As from 1 February 2012, a statutory week's pay, which is most commonly used to calculate statutory redundancy pay and an unfair dismissal basic award, will increase from £400 to £430. The maximum compensatory award for unfair dismissal claims will also increase from £68,400 to £72,300.

2. April 2012

- **Statutory rates of pay**

From April 2012, statutory sick pay will increase from £81.60 to £85.85 per week. Statutory maternity, paternity and adoption pay will increase from £128.73 to £135.45 per week.

- **Unfair dismissal qualifying period (6 April 2012)**

It is expected that as from 6 April 2012, the qualifying period for unfair dismissal claims will increase from one to two years. It will only apply to those employees engaged on or after the date that the change comes into force – those already in employment before that date will retain the current one year qualifying period. Therefore, if employers are contemplating recruitment drives they may wish to hold off until April to take advantage of the change.

From a practical perspective, the change may pose problems for employers. Firstly, it may prove harder to recruit since many employees, particularly in the current economic climate, will not be prepared to risk a two year period with no unfair dismissal rights. Secondly, disgruntled employees who do not have two years' service may try to bring other claims - citing discrimination, whistle-blowing, or trade-union reasons, for their dismissal - in order to avoid the service requirement. This already happens when employees have less than a year's service. These claims, while they may be unsuccessful, will be more complex and consequently more expensive to defend.

Finally, there is a possibility, as happened in 1992 when the qualifying period was changed, that the two-year rule could be challenged on the basis that it is indirectly age and/or sex discriminatory. It has already been established that more women than men have less than two years' continuous service; the same is true of younger workers. If a similar challenge is brought, employers may face years of uncertainty before the courts decide whether this indirect discrimination can be justified.

- **Deposit Orders**

Although a seldom used power, if a Tribunal believes that a claim has little prospects of success they can order the individual to make a payment into court of up to £500 which may be forfeited if the case is lost. This figure will increase to £1,000 in April 2012 in order to deter vexatious litigants.

- **Costs awards**

Another change due in April 2012 is that the maximum amount of legal costs a Tribunal can award to a successful party (without referring the case to the county court for detailed assessment) will increase from £10,000 to £20,000. Again, this is to discourage parties from bringing misconceived proceedings. However, this will still require a change in the Tribunal's approach as they are often reluctant to award costs.

- **Tribunal fees**

It is proposed that from 2013/2014 employees will have to pay to bring a claim. The government has proposed two different fee charging structures which are currently being consulted upon:

1. An issue fee and a hearing fee, the amount of which would depend on the nature of the claim. For example, in an individual unfair dismissal claim, the claimant would have to pay an issue fee of £200 and a hearing fee of £1,000.
2. An issue fee only, the amount of which will depend on what the claimant states their claim to be worth. For example an individual unfair dismissal claim worth less than £30,000 would cost £500 to issue and one worth more would cost £1,750.

The hope is that individuals will think carefully before embarking on litigation. The downside is that if the individuals do decide to issue a claim, it may be harder to persuade them to withdraw with no payment as they will not wish to be left out of pocket by having to cover any Tribunal fees themselves.

- **Witness expenses**

Tribunals will have powers to direct parties to bear the costs of witness attendance and the government will withdraw state-funded expenses.

- **Judges to sit alone**

Unfair dismissal cases will be heard by a judge sitting alone without lay members. This change will be reviewed after a year to determine what difference it has made (if any) to the efficiency of the tribunal system.

3. October 2012

- **Pension auto-enrolment**

New laws coming into effect in October 2012 will require UK employers to automatically enrol eligible jobholders into a pension scheme and pay mandatory minimum contributions. The government is staging implementation over four years from 1 October 2012, with employers separated into bands according to their payroll size. Larger employers will be starting first and the initial wave of employers will be able to voluntarily start auto-enrolment as early as July 2012.

- **National Minimum Wage**

Limits will be reviewed and potentially increased, depending on what the Low Pay Commission recommends in February.

4. Other possible key changes later in 2012 and beyond

As a result of the response to the Resolving Workplace Disputes consultation, the government also intends to make the following changes, although no specific dates for the changes have been provided yet:

- **TUPE 2006**

The BIS has been seeking views on the effectiveness of TUPE 2006 given concerns that the regulations are overly bureaucratic. Particular focus has been on service provision changes, insolvency proceedings and collective redundancy consultation. The call for evidence closed on 31 January 2012 and the evidence will be used to formulate policy proposals that will be put forward for formal public consultation later in the year.

- **Holiday**

An amendment will be made to the Working Time Regulations 1998 to clarify when leave which cannot be taken due to absence on maternity, adoption, parental and/or paternity leave can be carried over to the next leave year.

Furthermore, in order to align UK law with judgments from the European Court of Justice, workers who are unable to take annual leave during one holiday year will be able to carry unused leave over to the next holiday year.

- **Early ACAS conciliation**

Claimants will be required to provide details of their disputes to ACAS before the Tribunal, for pre-claim conciliation (PCC) lasting one month. If the parties agree to take part, the limitation period for the claim will be temporarily suspended. If it is refused by either party or is unsuccessful, the Claimant will be able to proceed with the claim in the Tribunal within one month after the conclusion of the PCC.

According to the ACAS website, this scheme is unlikely to be introduced before April 2014.

- **Financial penalties for employers that lose at Tribunal**

The government intends to introduce financial penalties for losing employers at the levels proposed in the consultation, which will be half of the total award made by the Tribunal in the case. The minimum threshold will be £100 and the maximum cap will be £5000. However these penalties will not be automatic; the tribunal will have a discretion to decide whether to levy one or not.

Where the award is non-financial, the tribunal will be able to ascribe a monetary value – no further guidance on this has been provided. If a penalty is levied it can be reduced by 50% if paid within 21 days.

- **Compromise Agreements**

It is likely that a consultation will be launched to consider how compromise agreements are used and whether they need to be simplified.

- **Rapid Resolution Scheme**

A consultation process is likely to be commenced which could potentially provide quicker and cheaper determination of low value straightforward claims, such as claims for holiday pay.

- **Protected Conversations**

The Government intends to consult on the introduction of "protected conversations" which will potentially allow an employer and employee to have frank and open discussions before disputes escalate.

- **No-Fault Dismissals**

The Government will be seeking views on a proposal to introduce "compensated no-fault dismissal" for companies with ten or fewer employees (micro firms).

- **Simpler Dismissal Processes**

The government is looking at dramatically slimming down current dismissal processes which are considered to be too lengthy and unfair to the parties involved. Views will be sought on how to create a simpler and clearer dismissal procedure which could also involve changes to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

- **Whistleblowing cases**

It has been suggested that the whistleblowing rules should be amended so that disclosures about breaches of employment contracts are no longer covered.

- **Parental Leave extension**

In March 2012 the entitlement for Parental Leave was due to be increased from 3 months to 4 months, in line with a new EU Directive. However this has now been moved to March 2013 to allow for a full overview of the Parental Leave system.