

# Employment Write News

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Last year, the Government announced various consultations and proposals relating to employment law. In this issue of Employment Write we examine the main changes expected to take effect this year, and what employers need to do to prepare for them.

## Changes in April 2012

1. **Increase in qualification period for unfair dismissal:** Despite mixed feedback during the consultation process, the Government has decided to proceed with changing the law so that the qualification period for protection from unfair dismissal will double from 1 to 2 years' service, as from 6 April 2012.

In various briefings to the media, the Government justified this change to the law on the basis that it was an important step in supporting businesses in recruitment and retention. This has, however, been subject to criticism, as there is no obvious link between this change to the law and recruitment or retention.

We are still waiting for transitional provisions to be produced. Therefore, it is not currently clear whether the change to the law will apply to:

1. Only employees hired as from 6 April 2012,
2. Only employees with under 1 year's service as of 6 April 2012, or

3. All employees (meaning that employees with more than 1 year's service but less than 2, will lose their protection from unfair dismissal overnight).

Recent speculation suggests that option 1 will be adopted. However, this is still subject to Parliamentary approval.

Until the situation is clarified, employers may wish to think carefully about the timing of any potential dismissals in the run up to April, particularly in relation to employees with less than two years' service, in case there is an advantage to acting prior to or after the change on 6 April 2012.

Whilst some employers will no doubt welcome this change in the law, caution is to be advised as there may well be a rise in speculative discrimination and whistleblowing claims if individuals dismissed with less than 2 years' service try to find other ways of bringing claims.

2. **Deposits and Costs in Employment Tribunal Claims:**

It is currently possible to apply to the Tribunal for an order that a Claimant must pay a deposit before being able to proceed with an Employment Tribunal claim. A Claimant will be ordered to pay a deposit if the Tribunal believes that the claim has little realistic prospects of success. In order to address business concerns that vexatious claims can proceed too easily, the maximum deposit order that a Tribunal can make is to be doubled from £500 to £1,000.

Similarly, to ensure that costs awards more accurately reflect the true cost to businesses of defending a claim, the maximum fixed cost award is to be increased from £10,000 to £20,000.

Therefore, whilst deposit and costs orders are not made frequently in the Tribunal, it will be worth making applications for these orders more often in the future as the amounts involved are more significant (although Claimants will also be able to claim higher levels of costs against employers too).

**3. Compromise Agreements:** Despite the Government insisting that there has been no drafting error in the Equality Act 2010, a 'lack of clarity' in the Act has led many to question the validity of compromise agreements. The Government is concerned that this has reduced confidence in their use.

This drafting error, or lack of clarity, is to be rectified. At the same time, the Government is going to rename Compromise Agreements as 'Settlement Agreements'. It is thought that the word 'compromise' may currently dissuade some individuals from entering into compromise agreements, as they do not want to feel like they are compromising on their rights.

The Government hopes that these changes will increase the use of settlement agreements and, consequently, reduce Employment Tribunal claims.

**4. Review of the Tribunal system:** The Government has also ordered a complete 'root and branch' review of the entire Tribunal system. Likely topics of the review include:

- Introducing a power to strike out weak claims;
- Increasing the information that a Claimant is obliged to provide when submitting a claim (for example, a Claimant may in the future be required to provide a schedule of loss when they submit a claim so that the value of the claim can be calculated at the outset); and
- Whether parties should be penalised for rejecting reasonable offers of settlement (as is the case in civil proceedings).

A revised procedural code is to be produced by April 2012. In the meantime, the Government is also to confirm the following changes by April 2012:

- State funded expenses for witness attendance at Tribunal hearings are to be

abolished. Instead parties are to bear the costs of their own witnesses attending and Tribunals are to be given the power to order that an unsuccessful party bears the cost of the successful party's witnesses' attendance;

- Judges are to sit alone, and not as part of a panel, in straightforward unfair dismissal cases; and
- To help speed up cases, witness statements are (as a general rule) to be 'taken as read' at hearings, instead of being read out by the witness at the hearing.

## Other changes expected to come into effect soon

**1. Financial Penalties for Employers:** Currently, the Tribunal system is free to use. However, the Government intends to introduce fees in the next couple of years (see further details below). In addition, for the first time, the Government is to introduce financial penalties, payable to the Exchequer, to penalise employers who lose Tribunal claims.

The financial penalty will be based on the total amount of the award made by the Tribunal against the employer. It will be half the amount of the total award so that the level of the financial penalty is proportionate to the award, subject to a minimum threshold of £100 and a maximum of £5,000. As an incentive for the penalty to be paid quickly, it will be reduced by 50% if payment is made within 21 days.

This is a controversial development as there will not be an equivalent penalty for employees. We anticipate employees trying to secure higher settlements as a result.

Whilst the Government has confirmed that financial penalties are going to be introduced, no date has so far been announced. We will publish an update when we know more.

**2. Compulsory ACAS conciliation:** In the future, Claimants will be required to submit the details of their claim to ACAS first, who will then offer conciliation assistance. This pre-claim conciliation period shall last one month. Claimants shall be entitled to proceed with submitting their claim if either party rejects conciliation, or if the attempt is unsuccessful. ACAS, however, shall have to provide a certificate confirming this before a claim can be issued with the Tribunal.

Pre-claim conciliation is in line with the Government's intention to increase the role of mediation in resolving employment disputes. Mediation has been found to be particularly successful in resolving bullying allegations, discrimination and diversity issues and issues of fairness. However, uptake has been low due to real and perceived costs.

ACAS have indicated that this new system will come into force in April 2014.



## Issues still subject to consultation

**1. Fees:** Tribunal fees will be introduced for the first time in either 2013 or 2014, but the Government is currently seeking views on two proposed fee structures.

In the first proposal, an initial fee will be payable on the issuing of a claim, ranging from £150 to £250, depending on the type of claim: if the claim proceeds to a hearing then a second fee will be payable, ranging from £250 to £1,250. Fees are also proposed for various applications, including issuing a counter claim, setting aside a default judgement, a request for written reasons and

for the dismissal of a claim after settlement or withdrawal.

In the second proposal, a fee will only be payable on the issuing of a claim. The level of this fee will depend on the value of the claim (ranging from £200 up to £1,750).

These proposals have been controversial as the fee levels appear high and are described by some as preventing access to justice by those most in need of it. However, there are likely to be a number of exemptions available. The outcome of the consultation, which closes on 6 March 2012, is therefore eagerly anticipated.

**2. Protected conversations:** Currently, it is common for employers to be wary of suggesting a mutually agreeable departure to employees in case the conversation is referred to in later Tribunal proceedings, or it becomes a cause in itself for claiming constructive dismissal. Whilst employers often think they can hold 'without prejudice' conversations with an employee to propose a package for an employee to leave, in reality these conversations are usually not actually protected by the 'without prejudice' label (as there has to be a genuine legal dispute for it to apply).

The Government is proposing the introduction of 'protected conversations' in order to provide employers with the confidence to have such discussions. The details so far are limited, and it has been suggested that protected conversations may be limited to discussing retirement and poor performance issues. We will provide further detail when it is available.

In the meantime there has been a mixed response to this proposal. Whilst there is clearly an argument for establishing a means of facilitating 'safe' discussion, there is concern that the current proposals may give the green light to some employers to bully their staff into accepting arrangements that they would otherwise have not agreed to. In our experience, it is usually possible to have sensible discussions with employees about

any concerns under the current regime, as long as the discussion has been considered carefully in advance. Therefore, in reality, whilst political mileage is being made of this proposal, it is unlikely to make a significant difference in practice.

## Other Possible Changes

The Government has also suggested possible changes in relation to the following issues:

1. Changing the way in which TUPE applies to contracting out scenarios;
2. The possibility of reducing the 90-day period for collective consultation in large-scale redundancy situations to 60, 45 or 30 days;
3. The introduction of “compensated no-fault dismissals” for businesses with 10 or fewer employees; and
4. “Radically slimming down” current dismissal procedures and amending the ACAS Code of Practice on Disciplinary and Grievance Procedures.

All in all, we can expect some big changes to employment law and practice over the next few months. Please keep an eye on our blog (<http://www.blog.neilmyerson.co.uk/>) to stay up-to-date as further details of the proposed reforms are announced.

## Other News in Brief

- As of 1 February 2012, the maximum compensatory award for unfair dismissal will rise from £68,400 to £72,300 and the cap on a week's pay (used for calculating redundancy pay and the basic award in unfair dismissal cases) will rise from £400 to £430.
- In April 2012, the Government is expected to issue a prescribed form for modern

apprenticeship agreements, under the Apprenticeships, Skills, Children and Learning Act 2009. If you engage apprentices and would like to know more about this development, please contact a member of our team.

- In an interesting development in discrimination law, the Employment Appeal Tribunal has held that the marriage discrimination provisions of the Sex Discrimination Act 1975 (now replaced by the Equality Act 2010) can protect a woman from less favourable treatment on the grounds that she is married to a particular man. This arguably extends the protection previously available as such discrimination previously had to relate to the person's *marital status*: not who they were married to (*Dunn v Institute of Cemetery and Crematorium Management*).
- As of 6 April 2012, the following rates will apply:
  - Statutory Maternity Pay, Paternity Pay, Additional Paternity Pay, Adoption Pay and Maternity Allowance will increase from £128.73 to £135.45; and
  - Statutory Sick Pay will increase from £81.60 to £85.85.
- The DWP has confirmed that the staging dates for businesses with fewer than 50 employees to begin automatically enrolling their staff into pension schemes will be put back by at least a year from 1 April 2014 to 1 May 2015. Large businesses are unaffected by this announcement and will be obliged to introduce contributory pension arrangements for their employees over a four year staging process commencing on 1 October 2012 (the specific commencement date depending on the number of employees).

## The Employment Department - Key Contacts



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Partner and Head of Department

Jo is a nationally recognised employment law specialist. She is a graduate of Cambridge University and was a partner at Addleshaw Goddard before she joined Neil Myerson in 2007 to head up the firm's team of employment specialists.

Jo has significant experience of dealing with Employment Tribunal claims, discrimination matters and the employment aspects of corporate and commercial transactions. She also regularly provides training to clients on HR and employment law issues. She is described by the independent legal directories as "bright, decisive, proactive and switched on", providing clients with "astute advice, straightforward thinking and client focus".

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Jo has worked as an employment law specialist for many years at leading commercial firms, after studying Law at the University of Leeds. She joined us in 2009 from Eversheds to strengthen further our high level employment service to our commercial clients.

Jo is an experienced Employment Tribunal advocate and deals with complex, high value claims. She also has extensive expertise in executive arrangements and terminations and has a particular interest in the employment law aspects of corporate and commercial transactions, insolvency, restructuring and redundancy.

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John Morris  
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John has worked as a specialist employment lawyer since he qualified in 2005. He studied Law at Cardiff University and then worked at national law firms DLA Piper and Beachcroft before joining Neil Myerson in 2008.

His experience includes handling Employment Tribunal claims, disciplinary and grievance issues, negotiation of executive contracts and severances, and TUPE matters. John regularly provides training to our clients in order to keep them up to date. He also deals with business immigration issues for our commercial clients.

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Charlotte Gilbert  
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Charlotte has been providing commercial and practical employment advice to our clients since she qualified as a solicitor in 2008. She studied Law at the University of Durham and then completed her training with the firm.

Charlotte deals with all aspects of employment law including contracts of employment, policies, handbooks, resolving employment disputes, compromise agreements and Employment Tribunal claims.

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James Chandler  
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James studied History and Politics at Lancaster University and attended the College of Law in York. He then trained with Pannone LLP in Manchester before qualifying as a solicitor and joining Neil Myerson in 2011.

James advises on a range of employment law matters including employment disputes, employment contracts, staff handbooks, Employment Tribunal claims and Compromise Agreements.

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