Employment Law Reform

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The *Coalition Agreement* outlined a policy commitment to review employment law. The Employment Law Review was announced on 27 January 2011. The Review gave rise to several consultations and further reviews, including consultation on resolving workplace disputes, consultation on introducing fees in the employment tribunals and the Employment Appeal Tribunal and a fundamental review of employment tribunal rules of procedure. A number of significant changes to employment law have been or are due to be implemented by the *Enterprise and Regulatory Reform Act 2013* and *Growth and Infrastructure Act 2013*. These include changes to whistleblowing law, the introduction of a new employment status known as "employee shareholder" and changes to the law concerning negotiations before termination of employment. This note provides an outline of the changes.

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1 Introduction

The *Coalition Agreement* outlined a policy commitment to review employment law:

> We will review employment and workplace laws, for employers and employees, to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive.[1]

The Employment Law Review was announced on 27 January 2011. The Review gave rise to a number of consultations and further reviews, including consultation on resolving workplace disputes, consultation on introducing fees in the employment tribunals and the Employment Appeal Tribunal and a fundamental review of employment tribunal rules of procedure.[2] The background and detail of the Review is discussed in two House of Commons Library Standard Notes: *Employment Law Review – workplace disputes* (December 2011) and *Employment Tribunal Reform – Introduction of fees and new rules of procedure* (August 2012).[3]

The Department for Business, Innovation and Skills (BIS) published a document on 14 March 2013 entitled *Employment Law 2013: Progress on Reform*. The timeline on page 18 of that document set out the progress to date (as at March 2013) and reforms expected to be delivered between then and 2015. Key reforms that had been delivered by that date included an increase in the qualifying period for unfair dismissal claims from one to two years' continuous employment.[4] All employment commencing on or after 6 April 2012 is subject to the two year qualifying period (ie employees do not enjoy statutory protection from unfair dismissal until they have worked continuously for the same employer for two years). This reform was widely opposed by the trade unions but supported by business.[5] It is discussed in the Library's Standard Note: *Unfair dismissal: qualifying service rule* (August 2012).[6]

Another key reform was the abolition of the Default Retirement Age.[7] The Default Retirement Age of 65 permitted compulsory retirement for employees over that age provided they were given the opportunity to request to continue working. Under current law, a policy of compulsory retirement constitutes direct age discrimination unless it can be justified as being a proportionate means of achieving a legitimate aim. This is discussed in more detail in the Library's Standard Note: *Employment: Retirement Age* (June 2013).[8]

The following provides an update and overview of the significant employment law changes that had not been implemented at the date of the *Employment Law 2013: Progress on Reform* report. A number of these reforms have been/are due to be made by the *Enterprise*

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1 Cabinet Office, *The Coalition: our programme for government*, May 2010, p10

2 BIS, *Resolving Workplace Disputes A consultation*, January 2011, consultation closed on 20 April 2011; BIS, *Introducing fees in employment tribunals and Employment Appeal Tribunal - Consultation document*, December 2011, consultation closed on 6 March 2012; BIS, *Fundamental Review of Employment tribunal Rules*, July 2013

3 Tim Jarrett, *Employment Law Review – workplace disputes*, Commons Library Standard Note SN06118, 21 December 2011; Jacqui Parker, *Employment Tribunal Reform – Introduction of fees and new rules of procedure*, Commons Library Standard Note SN06407, 30 August 2012

4 *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012*

5 'Unfair dismissal reform divides government and unions', *The Guardian* [online], 6 April 2012 (accessed 8 July 2013)

6 Jacqui Parker, *Unfair dismissal: qualifying service rule,* Commons Library Standard Note SN0456, 3 August 2012

7 *The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011*

8 Doug Pyper, *Employment: Retirement Age*, Commons Library Standard Note SN00961, 4 June 2013

and Regulatory Reform Act 2013 (*ERRA 2013*). BIS has published an indicative timetable of these reforms, available here.[9]

2 Reforms to date

2.1 6th April 2013: collective redundancy consultation

The *Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013* reduced the minimum period for collective redundancy consultations from 90 to 45 days in the event that an employer proposes to dismiss more than 100 employees. Fixed-term employees whose terms have expired are now excluded from such consultations. The draft Order was laid before Parliament on 24 January 2013 and debated in the House of Lords on 12 March 2013.[10] It was approved in the Lords without division and subsequently approved in the Commons without debate on 26 March 2013.[11]

Comment

The TUC said "there is no case for reducing the 90 day redundancy consultation period" and that "any reduction in consultation rights would result in unnecessary redundancies, rising unemployment and rising job insecurity."[12] Labour were also strongly opposed to the change. Ian Murray, Shadow Minister for Business, Innovation and Skills, said:

> Collective redundancies are, of course, one of the most dramatic forms of job loss. That is why the current legislation on collective redundancy is so vital; it allows for particular care to the process of achieving business restructuring, ensuring that employees are involved as much as possible in the decision-making and if job losses are necessary then all employees and their representatives are closely involved. [13]

Both the CBI and British Chambers of Commerce (BCC) supported the change. The general argument put forward by employer representatives was that, whilst the 90 day period may have been necessary when correspondence was conducted by post and less immediate than it is today, it is no longer necessary and represents an impediment to business restructuring.[14]

2.2 17 January 2013 to 11 April 2013: consultation on recruitment sector and TUPE

The Government consulted on reforming the regulatory framework for the recruitment sector and is currently analysing the responses to the consultation. See here.[15] The Government also consulted on reforming the law on employee rights upon the transfer of a business (TUPE[16]) and is currently analysing the responses. See here.[17]

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9 BIS, *Enterprise And Regulatory Reform Act 2013 - Commencement Provisions within the Act - Indicative Timetable*, 6 June 2013

10 HL Deb 12 March 2013 cc210-226

11 HC Deb 26 March 2013 c1516 – the Order was approved on division: Ayes 224, Noes 128

12 TUC, *Collective Redundancy Consultation - BIS Call for Evidence - TUC response*, 31 January 2012

13 'How the coalition sneaked through a law making it easier to sack workers', *The New Statesman* [online] (accessed 8 July 2013)

14 CBI comments on changes to collective redundancy rules, CBI website 18 December 2012 (accessed 8 July 2013); Government must press ahead with changes to redundancy rules, says BCC, 20 February 2012 (accessed 8 July 2013)

15 GOV.UK, Consultation on reforming the regulatory framework for employment agencies and employment businesses, 17 January 2013

16 *The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)*

17 GOV.UK, Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes, 17 January 2013

One of the major predicted reforms is the abolition of TUPE protections in the event of "service provision changes" (SPCs), i.e. when work is outsourced/in-sourced or a contractor is changed. *Directive 2001/23/EC*, from which TUPE protections are derived, does not require employment to be protected in the event of a SPC.

Comment

Both the CBI and BCC support the proposed changes and say that TUPE gold-plating prevents failing companies from being successfully restructured.[18] Former TUC General Secretary Brendan Barber said:

> TUPE law protects workers and gives businesses valuable security. Tampering with the regulations would not only generate uncertainty and needless litigation, it would also make low-paid workers vulnerable to mistreatment.[19]

2.3 June 2013: Acas Code of Practice on Settlement Agreements

A new Acas Code of Practice, published in June, is available here (see page 10 onward)[20] and provides guidance on the use of settlement agreements, in line with changes due to be made when sections 14 and 23 *ERRA 2013* commence on 29 July 2013 (see below, under "confidential pre-termination negotiations").

2.4 25 June 2013: Employment provisions of the ERRA 2013

The following important changes to employment law came into force on this date.

Employment Appeal Tribunal hearings can now be heard by a judge sitting alone: see section 12 *ERRA 2013.*

Section 13 *ERRA 2013* removed the qualifying period for unfair dismissal claims where the reason for the dismissal is the employee's political opinions or affiliation.

Section 15 *ERRA 2013* creates a power to vary by order the maximum compensatory award for unfair dismissal. Section 22 makes changes to the timing of indexation of various maximum awardable sums (e.g. awards in unfair dismissal claims) by reference to the retail prices index.

A number of changes to whistleblowing laws: introducing a public interest test for protected disclosures and removing the absolute requirement of good faith in certain cases. Additionally, section 20 *ERRA 2013* extends the definition of "worker" (whistleblowing protections apply to "workers"), affording protection to certain NHS contractors (see the Explanatory Notes, para 117).

Tribunals currently have the power to require a party to proceedings to pay a deposit, up to a maximum of £500, as a prerequisite for continuing in the proceedings should the tribunal view their argument as having little prospect of success. Section 21 *ERRA 2013* increases the maximum amount to £1000.

Section 64 *ERRA 2013* makes a number of changes to provisions of the regulatory and monitoring functions of the Equality and Human Rights Commission.

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[18] BCC: Devil's in the detail, but proposed employment law changes should boost employer confidence, BCC website, 17 January 2013 (accessed 8 July 2013); CBI backs new cap on unfair dismissal claims and easing TUPE regulations, CBI website, 17 January 2013 (accessed 8 July 2013)

[19] Weakening TUPE legislation risks low pay and increased unemployment, TUC website, 13 February 2013 (8 July 2013);

[20] Acas, *Acas response to consultation on Settlement Agreements Code*, June 2013

Section 72(1) *ERRA 2013* abolishes the Agricultural Wages Board, which previously set wages and conditions for agricultural workers. Wages in this sector will be subject to the National Minimum Wage, although the current *Agricultural Wages (England and Wales) Order 2012* will remain in force until October 2013.

Section 97 *ERRA 2013* requires the Government to prohibit caste discrimination by including caste as an aspect of race within the meaning of section 9(5) of the *Equality Act 2010*. This provision does not itself prohibit caste discrimination and there is no statutory deadline by which a Minister "must by order" provide for caste to be an aspect of race.

Comment

The changes to whistleblowing laws are summarised in the Library's standard note on whistleblowing (pages 9 – 12).[21] As discussed in that note, there was some concern voiced in the Lords about the changes, which largely centred on the absence of a clear definition of "public interest". This concern has also been expressed by legal commentators.[22]

The changes made by the *ERRA 2013* to the Equality and Human Rights Commission's monitoring functions were overshadowed during debate on the Bill by the proposed repeal of section 3 of the *Equality Act 2006*, so did not attract much comment (in the final event, the proposal to repeal section 3 was dropped).

Regarding the abolition of the Agricultural Wages Board, this was not debated in the Commons as debate on the *Enterprise and Regulatory Reform Bill* was guillotined. Both the Opposition and the unions were critical of this absence of debate.[23] However, organisations representing farmers were widely supportive of the abolition, and made the point that most agricultural employers were already paying in excess of the National Minimum Wage.[24]

The caste discrimination amendment to the *Equality Act 2010* was tabled by a crossbench peer (Lord Harries) and initially opposed by the Government. The Opposition supported the change in the law although voiced concern about the potential consequences of prohibiting caste discrimination and emphasised the need for consultation prior to prohibiting caste discrimination.[25]

3 Anticipated changes

The following details dates on which a number of employment law changes are expected to occur, based in part on the aforementioned indicative timetable published by BIS.[26]

3.1 29 July 2013: one year cap on unfair dismissal awards

The Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013 will cap the compensatory award claimants can receive in successful unfair dismissal claims to one year's pay, with a limit of £74,200.

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21 Doug Pyper, Whistleblowing and gagging clauses: the Public Interest Disclosure Act 1998, Commons Library Standard Note SN00248, 25 June 2013

22 A possible downside to whistleblowing changes, CIPD website 24 June 2013 (accessed 8 July 2013)

23 'No debate, no vote, no democracy' as the Agricultural Wages Board is abolished today, Unite website 16 April 2013 (accessed 8 July 2013)

24 See: IDS, *The implications for the National Minimum Wage of the abolition of the Agricultural Wages Board in England and Wales,* December 2011

25 HC Deb 23 April 2013 cc790-792; see also: Don't Take Us Back To The Caste System, Alliance of Hindu Organisations website, 12 April 2013 (accessed 8 July 2013)

26 BIS, *Enterprise And Regulatory Reform Act 2013 - Commencement Provisions within the Act - Indicative Timetable*, 6 June 2013

3.2 29 July 2013: employment tribunal fees and new rules of procedure

29 July 2013 will see the introduction of fees in employment tribunals. There will be an issue fee and separate fee for proceeding to a hearing. The applicable rate depends on whether the claim is a Level 1 claim (straightforward claims, e.g. for unpaid wages) or Level 2 claim (more complex, e.g. unfair dismissal or discrimination). The fees are:

- Level 1: issue fee £160; hearing fee £230;
- Level 2: issue fee £250; hearing fee £950.

New employment tribunal rules will be introduced on the same day, resulting from the review undertaken by Mr Justice Underhill (July 2012).[27]

Comment

The proposed introduction of fees for employment tribunal claims has proven controversial, dividing employer and employee representatives. The reaction to the proposals is summarised in the Ministry of Justice's consultation response:

> Claimants and groups representing their interests came out strongly opposed to the principle of charging fees, and as a consequence many responses disagreed with both options presented in the consultation. These respondents thought the fee proposals and the high level of fees proposed would deter claimants from making claims and that it was unfair that claimants were being asked to pay the majority of fees, particularly given the perceived financial inequality of employee versus employer. They also generally viewed fees as discriminatory.
>
> Business respondents generally supported both options with a tendency towards Option 2 where they found the idea of a threshold and higher fee attractive. Some were keen that fees acted as a disincentive for claimants to bring weak and vexatious claims. They supported the fact that the claimant would be required to pay the issue and hearing fees, as well as the proposals for limited refunds. They also broadly agreed with the proposals for multiple cases in both options.
>
> Little consensus could be found on the key issues across the groups, making it difficult to state a clear preference for either of the options, however respondents overall generally seemed to prefer a two stage fee, believing that it offered a second opportunity to encourage parties to consider settlement.[28]

The trade union Unison has applied for Judicial Review of the plan to introduce fees.[29] An outline of their argument is provided on the UK Human Rights Blog.[30]

3.3 29 July 2013: confidential pre-termination negotiations

Section 14 *ERRA 2013* is due to come into force on 29 July 2013, amending section 111A of the *Employment Rights Act 1996*.[31] Under this provision an employer and employee may confidentially discuss terminating their employment relationship. Evidence relating to these discussions will be inadmissible in any subsequent ordinary unfair dismissal claim. These

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27 *The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013; Fundamental review of employment tribunal rules: employment tribunal rules of procedure,* July 2013

28 MoJ, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal- Response to Consultation*, 13 July 2012, p7

29 UNISON demands equal access to justice, 17 June 2013 (accessed 8 July 2013)

30 Unison to Judicially Review 'Brutal' Employment Tribunal Fees, UKHR Blog website, 21 June 2013 (accessed 26 June 2013)

31 *The Enterprise and Regulatory Reform Act 2013 (Commencement No. 2) Order 2013*

changes are intended to facilitate the use of compromise agreements which, as of 29 July 2013, will be known as "settlement agreements".[32]

Comment

Both the BCC and CBI support the settlement agreement reforms.[33] The Opposition voiced some concern about whether the changes were necessary, in view of the existing practice of using compromise agreements.[34]

3.4 September 2013: employee shareholders

Section 31 of the *Growth and Infrastructure Act 2013* is expected to come into force in September, implementing employee shareholder status. Under this provision, an employee can give up certain employment rights – such as the right to claim for unfair dismissal – if, in return for the loss of rights, the employer gives the employee at least £2000 worth of shares in the company.

Comment

The Library research paper on the *Growth and Infrastructure Bill* outlines comment on the employee shareholder (formally referred to as "employee owner") provisions of the Bill (pages 36 – 38).[35] In summary, the CBI described it as potentially useful to some cutting-edge entrepreneurial companies, although said it was a niche idea.[36] The *Financial Times* said it may be useful for start-ups.[37] Labour strongly opposed the proposal, which was initially removed in the Lords as a result of amendments tabled by crossbench peer Lord Pannick QC. The proposal was finally agreed to during ping pong, after the Government inserted a requirement into the clause providing that an employee cannot take on employee shareholder status unless he has received independent advice.

3.5 Consolidation of National Minimum Wage regulations

The Government has said that it will introduce a single set of consolidated regulations "following consultation, during this Parliament".[38]

3.6 6 April 2014: Acas early conciliation scheme and discrimination questionnaires

Sections 7-9 and Schedules 1 and 2 *ERRA 2013* are due to come into force insofar as they implement a requirement that employment tribunal claimants submit their dispute to conciliation prior to proceeding with a claim.

Section 66 *ERRA 2013* is due to come into force, which will repeal section 138 of the *Equality Act 2010*. Section 138 provided for a system whereby a potential claimant in a discrimination claim could submit a "discrimination questionnaire" to their employer and any failure to answer a question could be held against the employer in subsequent proceedings.

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32 *The Enterprise and Regulatory Reform Act 2013*, section 23

33 BCC: Devil's in the detail, but proposed employment law changes should boost employer confidence, BCC website, 17 January 2013 (accessed 26 June 2013); CBI backs new cap on unfair dismissal claims and easing TUPE regulations, CBI website, 17 January 2013 (accessed 8 July 2013)

34 PBC 3 July 2012 c391

35 Smith, L., Sandford, M., Pyper, D., Richards, P., White, E., *Growth and Infrastructure Bill*, House of Commons Library Research Paper 12/61, 25 October 2012

36 CBI responds to George Osborne's speech to Conservative Party Conference, CBI website (accessed 8 July 2013)

37 Trading shares for workers' rights, *Financial Times*, 10 October 2012

38 HC Deb 14 May 2013 cc166-167W