

Enterprise & Regulatory Reform Bill, Public Bill Committee, June 2012

Law Society written evidence

Key Points

1. The Law Society ('the Society') is the representative body for 145,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law.
2. This briefing sets out the Society's views on Part 2 (clauses 7-17, and Schedule 2) of the Enterprise & Regulatory Reform Bill, published on 23 May 2012. The briefing covers:
 - a. Pre-claim conciliation by Acas (clauses 7-9, and Schedule 2)
 - b. Rapid resolution of simple, fact-based employment tribunal claims (clause 10)
 - c. Judges sitting alone in the Employment Appeals Tribunal (clause 11)
 - d. Capping unfair dismissal compensatory awards (clause 12)
 - e. Financial penalties on losing respondent employers (clause 13);
 - f. Protected disclosures (clause 14)
 - g. Settlement agreements (clause 16)

Background

3. This briefing has been prepared by the Law Society's Employment Law Committee. The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.
4. The Society makes no comment on the employment market and the relationships within that market. This briefing is concerned with the implications of the Bill for the effective functioning of Employment Tribunals, and the impact on the parties who engage with the Tribunal process.
5. Part 2 of the Bill implements some of a package of reforms to the Employment Tribunal system on which the Government consulted in early 2011. The justification for this package of reforms is that there has been a significant rise in Employment

Tribunal claims caused by a prevalence of weaker cases and an insufficient use of mediation and conciliation, combined with over-long Tribunal hearings.

6. The evidence does not support this. In fact, the number of Employment Tribunal claims fell in 2010/11 and appears to be falling further in 2011/12.
7. The Quarterly Statistics published by the Ministry of Justice and the Tribunals Service show that there were 218,100 claims to Employment Tribunals between 1 April 2010 and 31 March 2011, an 8% fall compared to 2009/10 but an increase of 44% on those in 2008/09.
8. However, the Employment Tribunal and Employment Appeal Tribunal Statistics 2009/10 (GB) reveal that the increase in case numbers from 2008/09 to 2009/10 (85,000) was accounted for by an increase in 'single' claims of 8,900 and an increase in 'multiple' claims of 76,100.
9. The substantial increase in 'multiples' (that is when two or more individuals bring a claim against the same respondent arising out of the same circumstances) was largely accounted for by an increase in Working Time Directive claims from 24,000 to 95,200. The reason for this, spelled out in the statistics, was the mass working time claims in the airline industry which, for jurisdictional reasons, have to be re-lodged every three months.
10. In 2010/11 there were 60,000 single accepted claims, down by 15% on the previous year, and 157,500 multiple accepted claims (a fall of 4% on 2009/10).

Fees

11. The Government published a consultation on the introduction of fees in the Employment Tribunal and Employment Appeals Tribunal in early 2012. To date, there has been no further announcement of whether the proposed fees will be implemented or what form they will take. However, if introduced, they are likely to have an impact on many of the changes announced in this Bill including pre-claim conciliation, financial penalties, rapid resolution of certain claims and the proposed cap on unfair dismissal compensatory awards. Analysis of these clauses needs to take into consideration the proposed fees regime.

Pre-claim conciliation by Acas (clauses 7-9, and Schedule 2)

12. Clauses 7 – 9 and schedule 2 are concerned with pre-claim conciliation procedures i.e. compulsory referral to Acas for conciliation prior to a claim being presented to an Employment Tribunal. This is voluntary for both parties. While the Bill provides provisions for how this is going to work and, in schedule 2, how this will affect the normal three month time limit within which most employment law claims have to be presented to a tribunal, the process itself is still in development.

13. The Society supports an increased role in early conciliation for Acas. However, it is concerned that the operation of procedures will be too technical and complicated, particularly with regard to time limits and in what circumstances Employment Tribunals will be able to extend such limits. This complexity could lead to satellite litigation. Previous statutory dispute resolution procedures which were too technical and led to as many disputes as they resolved so it is vital that the guidance on pre-claim conciliation and time limits is clear.
14. Acas will need to be adequately resourced and its role clearly defined. For example, the Society does not believe that Acas should be expected to work out time limits itself as this goes beyond its proper role.

Decisions by legal officers (clause 10)

15. Clause 10 permits 'legal officers' to determine some (to be specified) types of Employment Tribunal claims.
16. It is not clear whether these claims will attract fees. The impact of the proposed Employment Tribunal fees might be mitigated by the introduction of a new method of adjudication for lower value claims where no fees are payable. A rapid resolution scheme which draws on these approaches might help to preserve access to justice for claimants bringing lower value employment claims.
17. Any proposed fees structure could result in fees being nearly as large as the claim in some cases. Claimants may instead choose to bring a claim in the small claims court where fees for some claims are lower and are recoverable. This would undermine the effectiveness of the proposed scheme.
18. 'Legal officers' must be sufficiently qualified, resourced and empowered to be able to make a swift and sustainable determination of claims. If they are not suitably qualified, their judicial position will be undermined.
19. While some interlocutory work could be delegated to a suitably qualified legal officer, the Society does not endorse legal officers having the power to strike out claims for a failure to comply with an order. Additionally, the listing of cases and other case management decisions should be considered by a judge.
20. Further details need to be determined regarding the scheme. The risk is that it will be too complex and confusing, particularly when a claim becomes more complex than originally thought, thereby adding delay and expense.
21. The Society queries whether any real savings will be made as most interlocutory work will be undertaken at the beginning or end of the day and is therefore already paid for in the salaries and fees paid to Employment Tribunal judges whereas the salaries paid

to legal officers would be an additional cost.

Composition of Employment Appeal Tribunal (clause 11)

- 22. Clause 11 provides for the reduction of the Employment Appeal Tribunal from a panel of three to a judge sitting alone (subject to a discretionary power to order a hearing in front of a full panel).
- 23. The Society does not have an opinion on this either way. However, the power to have a full panel in appropriate cases should remain, for example a perversity appeal.

Power by order to increase or decrease limit of compensatory award (clause 12)

- 24. Clause 12 permits variation of the cap on the compensatory award to be either (1) a specified amount of between one and three times median annual earnings, or (2) a specified number of week's pay (no lower than 52 weeks) for the individual concerned, or (3) the lower of the two. Clause 12(3) contemplates that the specified amount under point (1) (but not (2)) may vary 'in relation to employers of different descriptions'. It is not immediately clear whether the 'week's pay' would be subject to the statutory cap (currently £430 a week).
- 25. The Society is opposed to the introduction of this cap which will impact on a much broader group of claimants than the Government intends. The Government states that the median award is £4000. However, this does not take into consideration those claimants facing public sector pension loss and those claims that are settled before a hearing (by employers through compromise agreements or Acas) for much more than this amount.
- 26. The Society does not understand the basis of the cap which appears to be an arbitrary figure. The cap will prevent a substantial number of claimants who have been unfairly dismissed from recovering their full losses from the respondent. This is not mirrored in other jurisdictions where the principle of 'polluter pays' presides and compensation means just that. Denial of full compensation to claimants could lead to an increase in discrimination claims where there is no cap.
- 27. The Society is also concerned that the cap will add complexity when determining awards if the size of an employer, for example, needs to be assessed.

Power of Employment Tribunal to impose financial penalty on employers (clause 13)

- 28. Clause 13 provides for financial penalties to be paid by employers who are found to have breached a worker's rights, where there are (unspecified) aggravating features. These penalties will be between £100 and £5000, and (subject to those limits) will be

an additional 50% of the amount of compensation awarded to the worker. The penalty will be reduced by 50% for prompt payment. The penalty will be paid to the government, not the worker.

29. Aggravating features should be defined to provide clarity. The legislation should be amended to confine such awards to deliberate or unreasonable breach so that employers are not penalised for unintended shortcomings in their conduct of employment issues.
30. The Society is not convinced of the benefits of imposing financial penalties on employers for the following reasons:
 - a. A system of financial penalties may reduce the number of Employment Tribunal claims which reach ultimate hearing since the risk of additional separate financial penalties will increase the incentive on employers, depending on the circumstances of the case, to reach a settlement. However, the extent of this potential effect is difficult to quantify given the number of variables which an employer needs to consider when approaching tribunal litigation including the merits of the claim and how the amount of any award may be affected by factors such as mitigation of loss, contributory fault and adjustment by up to 25% to reflect unreasonable breach of the Acas Code.
 - b. There is also the risk that financial penalties will provide employees with additional leverage in litigation to the detriment of employers, and that this will be perceived as weighting the system against employers. The proposed upper ceiling of £5000 limits that potential impact, nevertheless this could present an additional burden for small businesses which is arguably inconsistent with the policy objectives of this legislation.
 - c. Many employers may not be deterred by the risk of a financial penalty of £5000 when the cost of paying compensation for unfair dismissal will be capped at a much lower amount.
 - d. Claimants do not benefit from the penalty. It seems particularly unfair that under clause 12 claimants face a drop in compensation yet they would not benefit directly from the penalty against the employer which instead would go to the exchequer. Additional compensation for aggravated features should go to the individual in the same way as aggravated damages are awarded in discrimination cases.
 - e. The objectives of resolving disputes and reducing the cost of the tribunal system may not be achieved if litigation becomes more complex and protracted as a result of this proposal. Not only will hearings be extended to allow for arguments as to the amount of any penalty, there could be greater satellite litigation over the amounts of such awards and the principles to be applied in making them.

- f. Uplifts on compensation of up to 25% are already available in cases of unreasonable breach of the Acas Code on Disciplinary and Grievance Procedures.

Disclosure not protected unless believed to be made in the public interest (Clause 14)

- 31. Clause 14 limits the definition of 'protected disclosures' (which are the basis of whistleblowing claims) by saying that the disclosure must, in the reasonable belief of the worker making it, be made in the public interest.
- 32. The extension of protection to a breach of 'any legal obligation' following *Parkins v Sodexho*, to include a breach of the whistleblower's own contract of employment was not what was intended by the Public Interest Disclosure Act 1998. The discrete point to be addressed therefore, was whether an individual could make use of the public interest argument in respect of a breach of a legal obligation owed only to him or her, for example in a contract of employment.
- 33. Clause 14 as currently drafted does not do this. From the previous consultation it was anticipated that the change (i.e. the requirement for a public interest element) would apply to a breach of a legal obligation only where the Bill refers to all of the disclosure strands. The provision should state that a breach of a legal obligation requires something more than a breach of the individual contract of employment so as to satisfy the public interest test. The present draft means that allegations about matters other than a simple breach of a legal obligation must fall within the public interest – so a disclosure that a criminal offence has been committed would also have to satisfy the public interest test.
- 34. The problem arising from the *Parkins* decision could be addressed by a far simpler provision to the effect that an individual should not be able to make a protected disclosure with regard to their individual contract unless the disclosure is objectively held to be in the public interest.
- 35. The Society believes that the Government should take this opportunity to also clarify the law in relation to what information has to be disclosed. A disclosure needs to be more than a mere communication, and information must be more than merely an allegation or a statement of a position: the worker must be 'conveying facts'.

Renaming of 'compromise agreements', 'compromise contracts' and 'compromises' (Clause 16)

- 36. Clause 16 renames 'compromise agreements' as 'settlement agreements'.

37. While an offer of a settlement agreement cannot be used as evidence in an unfair dismissal it can be used as evidence in a discrimination claim. Very careful guidance will need to provide sufficient detail regarding when it is an appropriate time to offer a settlement agreement so an employer does not expose themselves to a claim. The requirement to see an independent adviser should remain.
38. Additionally, while it is understood that, compared with the 'without prejudice regime', the need for an existing dispute will be removed in relation to 'protected offers' the exclusions to the 'without prejudice' protection (for example 'unambiguous impropriety') should remain.
39. The guidance should also indicate what employers need to do to manage the employment relationship if an offer is refused, when, employers will still need to go through a performance management process.