

## Enterprise and Regulatory Reform Bill

House of Commons Report Stage – Tuesday 16 October 2012

*The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 160,000 members, promoting the highest professional standards and the rule of law.*

### Key Points

This briefing has been prepared by the Law Society's Employment Law Committee, which is made up of senior and specialist employment lawyers from across the country. 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.

- **Clauses 7-9, and Schedule 2: Pre-claim conciliation by ACAS** – The Society supports these provisions, but emphasises the need for ACAS's role to be clearly defined.
- **Clause 10: Decisions by legal officers** – While some interlocutory work could be undertaken by suitably qualified legal officers, certain functions – such as striking out claims for a failure to provide with an order – should remain the preserve of a judge.
- **Clause 12: Confidentiality of negotiations before termination of employment** – Greater clarity is required in relation to these clauses so that employers' know when to offer a settlement without potentially incurring a claim.
- **Clause 13: Power by order to increase or decrease limit of compensatory award** – The Society opposes the introduction of a cap, which appears arbitrary. Claimants should be able to recover their full losses.
- **Clause 14: Power of Employment Tribunal to impose financial penalty on employers** – It is important that the "aggravating features" which may lead to a penalty are specified so that employers' are not penalised for unintended shortcomings.
- **Clause 15: Disclosure not protected unless believed to be made in the public interest** – Clause 15 fails to address the issue of whether an individual can make use of a public interest argument in respect of a breach of a legal obligation owed only to him or her, e.g. in a contract of employment. It should be replaced with a simpler provision to this effect.
- **Clause 52: Equality and Human Rights Commission** – The four proposed changes to the remit of the Equality and Human Rights Commission are unnecessary and ill-considered.

### Clauses 7-9, and Schedule 2: Pre-claim conciliation by ACAS

1. 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.
2. 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. It is vital that the guidance on pre-claim conciliation and time limits is clear.

3. ACAS will need to be adequately resourced and its role clearly defined.

#### **Clause 10: Decisions by legal officers**

4. Clause 10 permits 'legal officers' to determine some (to be specified) types of Employment Tribunal claims.
5. '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.
6. 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.
7. Further details need to be determined regarding the scheme, including how the legal officer would be supervised, whether they would have full tenure and what right of appeal there would be from their decision.

#### **Clause 12: Confidentiality of negotiations before termination of employment**

8. An amendment to clause 18 (Transitional provision) was tabled on 19 June 2012 allowing settlement agreements (clause 17) to be discussed within a 'protected conversation' (clause 12). This only applies to unfair dismissal claims. Discrimination, breach of contract, and automatic unfair dismissal (e.g. whistleblowing) will not be affected by the new rules. A protected conversation will not apply where the behaviour of the employer has been 'improper'. What is 'improper' is not defined in the legislation.
9. Although an offer of a settlement agreement could not be used as evidence in an unfair dismissal claim it could be used as evidence in a discrimination claim. Careful guidance will be needed on when it would be an appropriate time to offer a settlement agreement so an employer does not expose themselves to a claim. The requirement for the employee to see an independent legal adviser should remain.
10. The Society also queries whether and how these provisions would apply in cases of constructive dismissal. For example, an employee could resign in response to a protected conversation and claim that they have been constructively dismissed. A constructive dismissal claim can be both a breach of contract and an unfair dismissal claim, so under these rules, the protected conversation could be taken into account in determining the breach of contract claim but not the unfair dismissal claim, which seems artificial.

#### **Clause 13: Power by order to increase or decrease limit of compensatory award**

11. Clause 13 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.
12. The Society queries the evidential 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. 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.

#### **Clause 14: Power of Employment Tribunal to impose financial penalty on employers**

13. Clause 14 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. The penalty will be paid to the exchequer.
14. 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.
15. 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. 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.
16. 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.

#### **Clause 15: Disclosure not protected unless believed to be made in the public interest**

17. Clause 15 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.
18. The extension of protection to a breach of 'any legal obligation' following *Parkins v Sodexho*, to include a breach of the whistleblower's own employment contract was not what was intended by the Public Interest Disclosure Act 1998. The distinct point to be addressed therefore, was whether an individual could use a public interest argument in respect of a breach of a legal obligation owed only to him or her, for example in an employment contract.
19. The Clause fails to do this. 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.
20. 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.

#### **Clause 52: Equality and Human Rights Commission**

21. Clause 52 makes four changes to the Equality Act 2006 – the legislation that established the Equality and Human Rights Commission (EHRC) – to clarify its legislative remit:

##### *Repealing the EHRC's general duty at section 3*

22. Instead of repealing the general duty, section 3 should be amended to establish more clearly the EHRC's overriding purpose, its powers and duties and to support the focus on being an

equality regulator, and a national human rights institution. This would signpost the key objectives of the EHRC and assist in governing the scope of underlying functions, whilst leaving the flexibility to adapt to changing needs. Without such a duty, there is greater risk of regulatory gaps or overlap.

*Changing the requirement for the EHRC to report on progress from every three to every five years.*

23. The Society believes that a five year reporting cycle will be less responsive to changes in society. If a five yearly reporting cycle were to be linked to the electoral cycle the review might appear to be a commentary on the performance of the Government which would be unhelpful.

*Repealing the EHRC's good relations duty*

24. The EHRC's outreach work under the good relations duty ensures that it has visibility amongst the public and private sectors and private individuals. In our view the loss of this duty and its associated powers will not be compensated for by the EHRC's role in monitoring the implementation of a significantly weakened public sector equality duty. The ability to undertake good relations work is important to the proper functioning of the EHRC.

*Repealing the EHRC's power to make arrangements for the provision of conciliation*

25. This proposal contrasts distinctly with the Government's wish to resolve disputes without unnecessary and expensive recourse to the litigation. The provision of conciliation services by the expert body on discrimination is highly valued by those who seek guidance or assistance from the EHRC. Moreover, its wide ranging caseload enables the EHRC to monitor closely the impact of legislation and provides data on areas of discrimination/equality law and practice where the emphasis of its work should lie.

**Removing employer liability for third party harassment (proposed amendment October 2012)**

26. The Society believes that the third party harassment provision (section 40 Equality Act 2010) should not be repealed. Harassment on any of the protected characteristics is unacceptable in any workplace. This legislation has supported and encouraged best practice amongst employers and potentially reduced incidents of third party harassment at work.
27. The purpose of section 40 is to make an employer liable for failing to act. The employer is not held responsible for the third party's actions in themselves. Section 40 captures this responsibility by ensuring that employers will be liable for failing to act in circumstances only where they have been told of the harassment; when it has happened on at least two previous occasions; and where the employer has not taken such steps as would have been reasonably practicable to prevent the harassment.
28. This strikes an appropriate balance between those responsible employers who, despite displaying their intolerance of staff harassment and doing all that is reasonably practicable to prevent harassment, have employees who nevertheless are subjected to incidents of abusive behaviour, and more reckless employers who are aware of a problem but have *failed to act* to protect their employees.

**For further information please contact:**

Richard Heinrich (Government and Parliamentary Affairs Unit)

T: 020 7316 5527 / M: 07794 335509

E: [Richard.Heinrich@lawsociety.org.uk](mailto:Richard.Heinrich@lawsociety.org.uk)