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The Changing Face of UK Employment Litigation

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The UK government has recently introduced a raft of measures affecting UK employment rights and litigation. A large number of these changes came into effect on 29 July 2013.

Taken together with previous changes to UK employment law (notably the new increased requirement for two years' service before an employee is able to bring most unfair dismissal claims), these changes are designed to cut red tape for UK employers and prevent spurious tribunal claims.

The changes are relatively positive for both UK and international employers who will likely welcome them as efforts to redress employers' grievances about the employee friendly culture of UK employment tribunal litigation and to produce less expensive and easier dispute resolution.

EXECUTIVE SUMMARY

The changes below mean:

(a) claimants will now need to pay to bring and continue with UK employment tribunal claims;

(b) a large number of claimants will now be entitled to less if they claim unfair dismissal;

(c) it will now be harder for a worker to bring a spurious whistleblowing claim;

(d) it is now easier for employers to have discussions with most employees to bring the employment to an end;

(e) UK employment tribunals will take a greater role in managing claims; and

(f) parties will need to be better prepared at an earlier stage when dealing with high value contractual disputes and restrictive covenants.

NEW UK EMPLOYMENT TRIBUNAL FEES

For any UK employment tribunal claim issued on or after 29 July 2013 fees are payable by the claimant when issuing and when a final hearing is listed.

The amount of the fee depends on the type of claim and the number of claimants. However, fees for individual claimants bringing the most common claims (unfair dismissal and discrimination) are £250 on issue of the claim and £950 on listing of the hearing. Depending on financial circumstances, individuals may be eligible to claim remission of part or all of their fees. Claims

issued without payment of the correct fee (or application for remission) will be rejected. The fees legislation is currently the subject of legal challenge by a leading UK trade union.

NEW LOWER CAP OF 12 MONTHS' SALARY FOR COMPENSATORY AWARDS FOR UNFAIR DISMISSAL

From 29 July 2013, the cap for the compensatory award for unfair dismissal claims is the lower of £74,200 or 12 months' gross salary.

Previously, when the cap was just £74,200, it was rare for UK employment tribunals to award more than 12 months' salary as compensation for unfair dismissal. Therefore, in practice, the average tribunal award is significantly lower than the theoretical maximum. It is to be hoped that all parties will now have a more precise and (for unrepresented claimants) more realistic expectation of the value of unfair dismissal claims and that this will discourage some claimants from issuing claims and will encourage settlement instead of litigation. (Note this cap does not apply to compensation for claims of discrimination or whistleblowing, which are still theoretically only limited by the amount of the individual's financial loss.)

CHANGES TO UK WHISTLEBLOWING PROTECTION

To attract protection under UK whistleblowing legislation, a disclosure (normally a complaint that a legal obligation has been breached or a crime committed) must now be 'in the public interest'.

In large part, this change is designed to prevent a particular form of whistleblowing claim based on a disclosure that the employer had breached the employee's own contract of employment. Employees (particularly senior executives) historically made such claims to try to avoid the cap on compensation for unfair dismissal. As most of these disclosures are unlikely to be 'in the public interest', it is hoped that such claims will no longer be sustainable.

Disclosures no longer need to be made 'in good faith,' but UK employment tribunals have the power to decrease compensation by up to 25% for disclosures that do not meet this criterion. The UK government has also closed a loophole so that employers can now be held liable for victimisation of whistleblowers by their colleagues.

GREATER SCOPE FOR DISCUSSIONS WITH EMPLOYEES ABOUT ENDING THEIR EMPLOYMENT WITHOUT LIABILITY

From 29 July 2013 most offers made to (or discussions held with) an employee with a view to terminating their employment on agreed terms are inadmissible in unfair dismissal proceedings in UK employment tribunals.

A UK employer is required to have a potentially fair reason and to follow a fair process in order to lawfully terminate the employment of an employee. As a result, employers risk a claim by the employee if they start discussions with the employee with a view to offering a package to terminate their employment without first following a fair process.

The new law means that the employee will not be able to adduce the discussions regarding potentially mutually agreeable terms to end employment as evidence if the employee subsequently claims unfair dismissal. In addition, employers can specifically reserve the right to bring the rejection of the employer's offer to the UK employment tribunal's attention in any costs application.

However, the new law does not affect proceedings involving other claims such as whistleblowing or discrimination (although these may be covered by the "without prejudice" principle if there is a

pre-existing dispute). Furthermore, the offer or discussion would still be admissible, even in unfair dismissal proceedings, if there is any improper conduct such as bullying, intimidation or exerting undue pressure on the employee to accept any offer (including threatening dismissal if they reject it). Therefore, as of July UK employers have greater scope to have these difficult conversations but they should still approach them carefully.

NEW EMPLOYMENT TRIBUNAL RULES OF PROCEDURE

The UK employment tribunal will now take a more proactive approach to managing claims.

From 29 July 2013, there are new UK employment tribunal rules of procedure. Many of the changes will just be of interest to practitioners. However, there are changes of more general interest. There is to be a new sift stage soon after claims are issued where judges will proactively look at whether cases should be struck out for not having a reasonable prospect of success. There is also a new general preliminary hearing with a wider scope to consider substantive legal issues, which should mean that many cases have a more substantive hearing of preliminary legal issues at an earlier date (rather than leaving them to the full hearing as often happened previously). This may lead to earlier settlement or more claims being struck out or withdrawn before a full hearing. In addition, the UK employment tribunal now has increased powers to make deposit orders of up to £1,000 for claimants to continue with claims that the judge feels have limited prospects of success and an increased ability to order costs of up to £20,000 against an unsuccessful party (without the need for detailed assessment).

CHANGES TO CIVIL COURT PROCEDURE

Changes to civil court procedure mean that cases will have to be run on the timetable and at a cost that the court (as opposed to the parties) considers appropriate and proportionate. The cost pressure is likely to be most keenly felt in small and medium sized claims.

High value contractual disputes and restrictive covenant cases involving former employees in the UK are heard in the High Court.

The key changes effecting employment claims in the UK High Court took effect on 1 April 2013:

- The court will be less likely to grant extensions of time for a party to comply with a court order. This means that parties have to be better prepared at an earlier stage.
- At the outset of a case, detailed budgets setting out estimates for the costs of the various stages of litigation need to be submitted (ideally agreed between the parties) to the court for approval. Fees will only be recoverable from the other side if they are within these budgets or if a variation is agreed by the court in advance.
- Costs will only be recoverable from the other side if they are proportionate to the complexity, value and importance of the case even if they were necessarily and reasonably incurred. This duty of proportionality will put a lot of pressure to keep costs down, particularly in small and medium sized cases.
- At the outset of a case, parties will have to complete a disclosure report (and in many cases an e-disclosure questionnaire) showing what documents exist, where they are, how much the parties expect disclosure to cost, and what their preferred method of disclosure is (with a view to agreeing to this with the other side and with the court). This means that parties will have to consider disclosure in detail much earlier in the litigation process.

- The rules in respect of certain funding arrangements typically used by claimants have changed. Success fees for 'no win no fee' style funding arrangements and premiums for after the event insurance policies are no longer recoverable from losing defendants. This is designed to end risk free litigation for claimants (which previously placed huge cost burdens on losing defendants).

CONCLUSION

These recent changes represent the culmination of many of the UK government's proposals in this area. There are some significant further changes proposed for early 2014 (including the introduction of state run compulsory conciliation before a claim is issued). For now, it will likely take some time to assess whether these changes are successful in achieving their stated aims of decreasing the number of spurious claims and increasing efficiency in litigation of employment disputes.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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