Headline

news from Head Office November 2011

Employees to pay to pursue a claim

From April 2013, employees must pay £250 to lodge a claim at the employment, and must pay a further fee of £1,000 when the hearing is listed. If the claim is worth over £30,000 the the fees will be higher. The money will be refunded if they are successful, but is forfeited if they lose. The Government has said that "poor claimants" will not have to pay, although there is currently no detail as to how a claimant qualifies as "poor".

The announcement was made on 3 October 2011 by George Osborne speaking at the Conservative Party conference in Manchester. Furthermore, as of 6 April 2012, employees will not be able to bring claims for unfair dismissal unless they have worked for the employer for at least continuous two years.

The Government maintains that these combined proposals should result in 2,000 fewer tribunals each year.

"We respect the right of those who spent their whole lives building up a business not to see that achievement destroyed by a vexatious appeal to an employment tribunal. So we are now going to make it much less risky for businesses to hire people," Osborne said.

The response has been mixed. There are concerns that 'crafty' employers may exploit employees.

However, CIPD Chief Economist John Philpott's has observed that the reforms may not have the desired effect, 'it is unlikely that raising the threshold from one to two years will have its intended effect of reducing the number of employment tribunal claims because employees are increasingly bringing claims linking unfair dismissal with discrimination claims which can be made from day one of employment.'

Furthermore, Barrister Elizabeth George writing in the Guardian highlights the need for employers to take more responsibility,' Businesses can best protect themselves from unreasonable employees by having fair but rigorous recruitment processes. I am not suggesting that it's fail-safe but the alternative is to deprive reasonable people (that's most of us) of the basic right to challenge genuine unfairness when it arises.'

Vince Cable, the Lib Dem business secretary, said the changes to unfair dismissal rules could save business nearly £6m a year.

But Len McCluskey, general secretary of the Unite union, speaking of George Osborne said: "He is a chancellor who wants to make it easier to hire and fire at will while making it harder for workers to challenge bad bosses.'

Helmont House, Churchill Way, Cardiff, CF10 2HE

E: info@askheadoffice.co.uk www.askheadoffice.co.uk

Introduction to

Head Office

Head Office provides an innovative and effective way to ensure that your business complies with the legislative requirements of both Human Resources and Health & Safety.

Keeping up with the ever changing legislations and pressures faced managing a team of staff is very expensive, particularly with the use of ad hoc employment lawyers and HR / health and safety consultants.

Head Office aims to reduce these expenditures through a monthly subscription which provides an insurance policy against the costs of an employee taking you to an employment tribunal and any award payouts. On a day to day basis, Head Office supports the business by providing updated guidance on new legislation and case law, a dedicated helpline staffed by HR legal experts and a contract / letter template builder which can be used both as a support mechanism for an existing HR team or as a part of an owner managed business where there is no dedicated HR resource.

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- **A safety net with our exclusive insurance policy that covers the costs of getting to tribunal and any award up to £250,000**
- **Minimising the risk to your cashflow (the average costs of attending a tribunal now stands at £9,500)**
- **Budgetary certainty without the need for adhoc HR consultants / employment lawyers**
- **Improved procedures resulting in increased productivity**
- **Easy access to commercial and practical legal advice**
- **More time to focus on maintaining and growing your business.**

As part of the offer Head Office will provide an initial review of your current position with the aim of recommending the most appropriate solution for your needs.

Call us now on **0845 217 8650** to speak to one of our expert advisers.

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3 Year absentee claims unfair dismissal

A Claimant has been granted permission to pursue a claim for unfair dismissal after a 3 year absence from work. In the case of Zulhayir v JJ Food Service Limited, the Employment Appeal Tribunal (EAT) held that Mr Zulhayir had not self-dismissed himself, as his employer, JJ Food Service Limited ("JJ") had not accepted a repudiation of his employment contract.

An employee of JJ for 4 years, in 2005, Mr Zulhayir took sick leave following an accident at work which involved serious injuries to his spine. As a result of the accident he became unfit to carry out his job. Initially, Mr Zulhayir supplied medical certificates which were delivered to the JJ by his son in law.

On 28 June 2006, JJ sent a letter by recorded delivery to Mr Zulhayirat the 7 Clydach Road, Enfield address which stated as follows: 'It has come to my attention that you left your job as a driver on 22 July 2005 and since then we did not receive any correspondence regarding your return to work despite the efforts we made to contact you.

Am I to assume that you no longer wish to work for J J Foods Service Limited? If so, please confirm in (sic) your resignation in writing. Please note that if you do not contact me by 5 July 2006 then we would conclude that you no longer wish to work for us and that you terminated your employment by your own volition.

If not, please contact me immediately upon receipt of this letter in order that we may arrange a meeting to discuss the situation.'

However, unbeknownst to JJ, in January 2006 Mr Zulhayirwas evicted from 7 Clydach Road, Enfield because he had been unable to pay the rent and had moved to other accommodation.

The letter first came to the attention of Mr Zulhayir when he received a letter dated 20 May 2009 from JJ's solicitors in the course of his personal injury claim against JJ relating to the initial accident.

Mr Zulhayir commenced proceedings for unfair dismissal and disability discrimination, amongst other claims. At the pre-hearing review, the Employment Tribunal concluded that failure of Mr Zulhayirin January 2006 either to inform JJ of his change in address or to arrange for post to be forwarded, amounted to an implied termination by him of his employment contract.

However, on appeal, the EAT held that the claims had been brought in time (there is a 3 month limitation). Mr Zulhayir had not "self-dismissed" as JJ had not accepted his repudiation of the contract, and this could not be inferred from their letter in June 2006. The EAT has now allowed all of Mr Zulhayir's claims to proceed to full hearing.

If the employer had adhered to the disciplinary procedure and dismissed the employee for unauthorised absence then perhaps the outcome would have been different. However, this case also highlights the caution with which employers should approach such situations involving termination, particularly, as in this scenario the employer, as noted by the EAT, could have attempted to communicate with Mr Zulhayir through his instructed solicitors in respect of the personal injury claim. The failure by the employer to implement a belts and braces approach, and instead to rely on the employee, may in the end prove costly.

If you have any queries relating to any of the articles in this magazine, please contact our legal advisors on 0845 217 8650

Tribunal fails to engage

A tribunal was criticised by the Employment Appeal Tribunal for failing to deal with the remedies of reinstatement and re-engagement.

In the recent case of King v Royal Bank of Canada the tribunal found that Ms King's redundancy was unfair due to a failure by the employer to follow the necessary statutory procedures. However, the tribunal failed to address Ms King's request that she be reinstated. The EAT held that this constituted a "striking omission."

Ms King was the victim of what the EAT described as a 'brutal' redundancy process.

An employer, prior to dismissing an employee for redundancy, is expected to consult an employee on the question of alternative employment and to take reasonable steps to offer an employee alternative employment.

The EAT held that the tribunal wrongly restricted itself to considering only vacancies that were available at the time of the dismissal and not looking to see if any possible vacancies may have arisen between the date of dismissal and the period during which the Bank should have followed a fair procedure.

Proposed Changes to unfair dismissal rules

A leaked report by Adrian Beecroft, Venture Capitalist and Tory donor, proposes scrapping unfair dismissal claims for unproductive workers. The Daily Telegraph quotes the Beecroft report as warning of "the terrible impact of the current unfair dismissal rules on the efficiency and hence competitiveness of our businesses, and on the effectiveness and cost of our public services."

It quotes the document as saying: "The rules both make it difficult to prove that someone deserves to be dismissed, and demand a process for doing so which is so lengthy and complex that it is hard to implement.

"This makes it too easy for employees to claim they have been unfairly treated and to gain significant compensation."

The report, commissioned by David Cameron, is understood to have the support of both the Chancellor and Downing Street.

The report has already faced a backlash amidst fears that a change in the law could cripple consumer confidence by generating widespread job insecurity.

The touted solution is to replace the rules on unfair dismissal with "Compensated No Fault Dismissal", which would 'allow employers to sack unproductive staff with basic redundancy pay and notice". However, critics will argue that the job role is not redundant and employers could then fire staff because they 'did not like them".

Lib Dem MP Norman Lamb, a close ally of deputy prime minister Nick Clegg, described the proposals as "madness". Sarah Veale, the TUC's head of equality and employment, speaking on the BBC Radio 4 Today programme said "I really do wish the government would stop going on about how if you reduced employment protection laws somehow that would make the economy boom again and create growth – it is absolute rubbish.'

According to the Ministry of Justice the cost to the taxpayer of running employment tribunals and the Employment Appeal Tribunal in England, Wales and Scotland was more than £84m in 2010-2011.

The report follows changes in unfair dismissal rules by the Chancellor George Osborne. The amount of time an employee must work for a company before they can claim unfair dismissal will rise from one year to two from next April, and employees will have to pay legal fees if they want to sue their employer for unfair dismissal.

Reporter blows whistle on interim hearing

Whistle blower and former News of the World chief reporter, Neville Thurlbeck has withdrawn from an employment tribunal hearing in his unfair dismissal case against Rupert Murdoch's News International.

Thurlbeck has been a prominent figure in the phone-hacking scandal as a result of his name appearing on correspondence sent to private investigator Glenn Mulcaire. The emails contained transcripts of messages left on the mobile phone of PFA chief executive Gordon Taylor.

This "for Neville" email was key in July when Rupert Murdoch and his son James appeared before MPs who asserted it evidenced that the Murdoch's knew phone hacking was not limited to one "rogue reporter" at the paper.

He was sacked by Rupert Murdoch's News International in September and was asking the tribunal to force the company to continue to pay him on the grounds that he was a whistleblower and should not have been fired.

The Guardian reported that Thurlbeck was due to attend an interim relief hearing, however, he withdrew, because the "issues to be determined by the employment tribunal will require key individuals within the News Group Newspapers being cross-examined". His solicitors want 'to ensure the benefits of a full hearing where complete disclosure from the parties would be made.'

Normally compensation for unfair dismissals are capped at £68,400. However whistleblower cases with the added protection of the Public Interest Disclosure Act can incur far greater awards. A notable case in 2001 resulted in the award of £805,000 in compensation to an unfairly dismissed whistleblower. Such numbers have of course no bearing on Neville Thurlbecks decision to pursue this course of action.

Litigate your losses

Former employees can be held to have failed to mitigate their loss if they turn down a job from the previous employer with whom they have had a dispute.

Ms Debique an employee of the British Army for four years gave birth to a baby daughter in 2005. A single parent, Ms Debique, following her return from maternity leave in September 2006 found it difficult to combine her responsibilities as a mother with her responsibilities as a serving soldier. An unsympathetic employer, and a succession of disciplinary procedures, which resulted in a formal warning, led to the mother of one handing in her notice in April 2007.

On 30 April 2007 she commenced proceedings in the Employment Tribunal against the Ministry of Defence ("the MoD"), alleging indirect discrimination under, what was the Sex Discrimination Act 1975 and the Race Relations Act 1976. Since the 1st October 2010 these claims would be brought under the Equality Act 2010. The tribunal found in her favor and following the dismissal of the MoD's appeal there was a remedy hearing. She was awarded £15,000 for injury to feelings but nothing for loss of earnings. The tribunal found that she had failed to mitigate her loss because she had refused an offer made to her during the period of her notice of a posting that would, according to the Tribunal, have adequately addressed her childcare difficulties.

The offer was a solid assurance that she would be based for five years somewhere where she could combine her military duties with her responsibilities as a parent. The Tribunal found that it was unreasonable to refuse an offer that accorded her security for so substantial a period.

The lawsuit received significant press coverage due to the total value being claimed by Ms Debique being reportedly in the region of £1.14 million. The Employment Appeal Tribunal dismissed her appeal.

The case highlights the necessity for employees to seek to mitigate their losses. It also accentuates the use of the employer, should they be in a position to do so and the employer/employee relationship is not permanently fractured, seeking suitable alternative work for the employee within the business.

£290,000 for sexually harassed BT employee

A BT telesales worker has been awarded £289,877 having resigned because of sexual harassment. It is the highest employment tribunal award of the last 12 months.

Ms Taylor worked as a sales executive at BT's 'Customer Street' telesales operation. Her manager, Mr Alcock subjected Ms Taylor to bullying, offensive, and obscene homophobic and racist language.

According to the Daily Mail, Ms Taylor endured her boss, Mr Alcock, "'thrusting' himself at her and female colleagues and was warned by him that if she failed to land a deal he would perform a sex act over her."

Despite complaining about Alcock's behaviour it persisted and she resigned in August 2009. Mr Alcock was subsequently disciplined and dismissed.

Ms Taylor suffered severe depression and pursued a claim for sexual harassment and constructive dismissal from BT. BT admitted liability for Mr Alcocks conduct amounting to a breach of Ms Taylor's contract of employment. The tribunal awarded her £20,000 for personal injury, £18,000 for hurt feelings, £3,000 for aggravated damages and £165,692 for future loss of earnings.

It is worth noting that despite dismissing Mr Alcock and admitting liability, the tribunal found that his behaviour had been tolerated by BT for too long. The award of compensation reflects the cost to BT for being too tolerant.

Flexible working rights fears allayed

Fears in relation to flexible working legislation causing problems for employers have proved unfounded, according to the Chartered Institute of Personnel and Development

Figures, published by the CIPD reveal that from a total of 218,100 claims in 2010-11, just 277 alleged that employers had failed to observe flexible working regulations. 229 of these claims were successfully conciliated by Acas or settled out of court, and of the 48 that actually reached tribunal just 10 were successful.

"These figures are hardly calculated to keep employers awake at night," commented Mike Emmott, employee relations adviser at CIPD. "They demonstrate beyond any doubt that the fears expressed about the impact of extending the right to request flexible working are grossly exaggerated. The right to request is not a burden on business but an example of 'light-touch' regulation that is more likely to support - rather than inhibit - business performance."

Employees have the statutory right to ask if they:

- have or expect to have parental responsibility of a child aged under 17
- have or expect to have parental responsibility of a disabled child under 18 who receives Disability Living Allowance (DLA)
- are the parent/guardian/special guardian/foster parent/private foster carer or as the holder of a residence order or the spouse, partner or civil partner of one of these and are applying to care for the child
- are a carer who cares, or expects to be caring, for an adult who is a spouse, partner, civil partner or relative; or who although not related to the employee, lives at the same address as the employee

Under the law an employer must seriously consider an application made, and only reject it if there are good business reasons for doing so. An employee whose request for flexible working is rejected can seek redress through the Employment Tribunal under the Equality Act 2010.

Employers prepare for pension reform

New laws coming into force in October 2012 will require employers to automatically enroll eligible jobholders into a pension scheme.

The new duties will apply to all employers in Great Britain. They will be formally implemented over four years starting on 1 October 2012, with larger employers being affected before smaller employers and new businesses. The initial wave of employers will be able to voluntarily start auto-enrolment as early as July 2012.

From the date the employer duties apply - referred to as the "staging date" - an employer must arrange for all eligible jobholders to be automatically enrolled in a qualifying pension scheme (though it can impose a three-month waiting period for new jobholders). It can use its existing occupational or personal pension scheme if it meets certain quality requirements or else enroll jobholders in NEST, (the National Employment Savings Trust Corporation) a government pension provider available to all employers who want to use it. NEST will be regulated in the same way as existing trust-based defined contribution schemes.

From 2012 every employer will have to enroll into a workplace pension, those workers who:

1. are not already in a workplace pension scheme;
2. are at least 22 years old;
3. have not yet reached State Pension age;
4. earn more than the minimum earnings threshold (likely to be £7,475 a year); and
5. work or ordinarily work in the UK (under their contract).

Employer Contributions in Defined Contribution Pension Schemes

Defined contribution (DC) pension schemes are based on the contribution rate and require a minimum total contribution, of which a specified amount must come from the employer.

Transitional period	Duration	Employer minimum contribution	Total minimum contribution
1	Employer's staging date to 30 September 2016	1%	2%
2	1 October 2016 to 30 September 2017	2%	5%
3	1 October 2017 onwards	3%	8%

Although employers will not become subject to the new auto-enrolment duties until 1 October 2012 at the earliest, they should consider advance steps to prepare for the reforms.

Auto-enrolment is the responsibility of the employer, not the Government or the pension industry. The Pensions regulator will oversee employer compliance and it has the power to fine employers for non-compliance.

Table 1: List of staging dates by PAYE scheme

PAYE scheme by size or other description	Staging date
120,000 or more	1 October 2012
50,000-119,999	1 November 2012
30,000-49,999	1 January 2013
20,000-29,999	1 February 2013
10,000-19,999	1 March 2013
6,000-9,999	1 April 2013
4,100-5,999	1 May 2013
4,000-4,099	1 June 2013
3,000-3,999	1 July 2013
2,000-2,999	1 August 2013
1,250-1,999	1 September 2013
800-1,249	1 October 2013
500-799	1 November 2013
350-499	1 January 2014
250-349	1 February 2014
240-249	1 March 2014
Fewer than 50 with the last 2 characters in their PAYE reference numbers 92, A1-AY, B1-BY, M1-MZ or Z1-ZZ	1 April 2014
150-239	1 May 2014
90-149	1 June 2014
50-89	1 July 2014
Fewer than 50 with the last 2 characters in their PAYE reference numbers AZ	1 August 2014
Fewer than 50 with the last 2 characters in their PAYE reference numbers BZ	1 September 2014
Fewer than 50 with the last 2 characters in their PAYE reference numbers 00-01	1 October 2014
Fewer than 50 with the last 2 characters in their PAYE reference numbers 02-04, 0A-0Z, C1-DZ	1 November 2014
Fewer than 50 with the last 2 characters in their PAYE reference numbers 05-07, 1A-1Z or E1-EZ	1 January 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 08-11, 2A-2Z or F1-GZ	1 February 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 12-16, 3A-3Z or H1-HZ	1 March 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers I1-IZ	1 April 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 17-22, 4A-4Z or J1-JZ	1 May 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 23-29, 5A-5Z or K1-KZ	1 June 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 30-37, 6A-6Z or L1-LZ	1 July 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers N1-NZ	1 August 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 38-46, 7A-7Z or O1-PZ	1 September 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 47-57, 8A-8Z or Q1-TZ	1 October 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 58-69, 9A-9Z, U1-U9, UA-UZ, V1-V9, VA-VZ, W1-W9, WA-WZ	1 November 2015
Fewer than 50 with the last 2 characters in their PAYE reference numbers 70-83, X1-X9, XA-XZ, Y1-Y9 or YA-YZ	1 January 2016
Fewer than 50 with the last 2 characters in their PAYE reference numbers 84-91 or 93-99	1 February 2016
(a) Fewer than 50 unless otherwise described or (b) no PAYE scheme	1 February 2016
New employer (PAYE income first payable between 1st April 2012 and 31st March 2013)	1 March 2016
New employer (PAYE income first payable between 1st April 2013 and 31st December 2013)	1 May 2016
New employer (PAYE income first payable between 1st January 2014 and 30th September 2014)	1 June 2016
New employer (PAYE income first payable between 1st October 2014 and 30th June 2015)	1 August 2016
New employer (PAYE income first payable between 1st July 2015 and 31st March 2016	1 September 2016

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