



EMPLOYMENT  
LAWYERS  
ASSOCIATION

P.O. BOX 353  
UXBRIDGE UB10 0UN

TELEPHONE/FAX 01895 256972  
E-MAIL [ela@elaweb.org.uk](mailto:ela@elaweb.org.uk)  
WEBSITE [www.elaweb.org.uk](http://www.elaweb.org.uk)

Phil Hodgson,  
Head of Communications,  
Law Commission,  
Steel House,  
11 Tothill Street,  
London SW1H 9LJ

14 October 2010

Dear Mr Hodgson,

**RE: Law Commission consultation on Law reform**

I am writing to set out the views of the Employment Lawyers Association ("ELA") on the Law Commission's consultation on Law Reform. We welcome the opportunity to comment on this consultation.

ELA is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

We have sought the views of our members on possible areas for the Commission to consider and these are set out below.

**Review of the cap on breach of contract claims in the ET**

A cap of £25,000 applies to claims for damages for breach of contract in the Employment Tribunal (Article 10 of Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (SI 1994/1623)). A higher cap should be imposed and our suggestion is £75,000. Parties become involved in two sets of proceedings:

1. claims to the ET for remedies in relation to statutory rights (unfair dismissal and discrimination) and
2. claims to the County Court/High Court for damages for wrongful dismissal where the damages sought are in excess of £25,000.

This causes unnecessary delays in resolving the issues and increased costs for the parties. It often delays the disposal of the ET proceedings which become postponed pending the outcome of the Court action.

### **Taxation of severance payments**

The way in which severance payments are taxed is too complex and unfair. The first £30k exemption should be abolished entirely or it should apply regardless of whether there is a PILON clause in the contract.

### **Non-payment of ET claims**

We would like the Commission to consider reform to deal with the common problem of the inability to tackle non payment of wages/holiday pay/notice pay etc where an employer "goes bust" but does not properly wind up through insolvency proceedings or similar and instead simply dissolves itself at Companies House. It is a common phenomena, particularly with smaller employers, that employees or workers have actually done the work over the few weeks before the employer shuts down and not been paid and then been dismissed with little notice due to redundancy with outstanding payments of holiday/notice etc unpaid. If the employer does not properly wind up then there is no recourse to the National Insurance Fund and we have the situation that employees have done the work, maybe for several weeks, and not been paid as the employer has disappeared. Nor do they get their other basic rights on termination (with the exception of redundancy payments which can be claimed from the Secretary of State in those circumstances).

Reform suggested is either to bring the requirements for entitlement to payments from National Insurance Fund under section 182 Employment Rights Act 1996 in line with the requirements for payment of redundancy payments in section 166 Employment Rights Act. Alternatively consideration could be given to making it harder for an employer to disappear without properly winding up or make it possible for an employee to pursue an employer who does dissolve one company only to begin trading again in the name of another company.

### **Tribunal powers to deal with claimants who lack capacity**

Reform should be considered to make it possible for a Tribunal to enquire into a claimant's capacity and where necessary to order the appointment of a litigation friend.

### **Short time working and lay offs**

Lay-off provisions can be used as a way of avoiding proper consultation and selection as there is no requirement for lay off or short time provisions to apply to a % of employees.

### **Employment status**

The definition of an employee might be a fruitful topic for the Law Commission to review. The deeming provisions in relation to e.g. agency workers are particularly complex.

### **Restrictive covenants**

There is a widespread view that the law on restrictive covenants is generally out of date and does not reflect current realities.

### **TUPE and insolvency**

Uncertainty concerning the application of TUPE to insolvency situations is generating a large number of appeals.

If you have any queries on the responses we have made, please do not hesitate to let me know and I am sure we can provide further clarification.

Yours sincerely,

**Bronwyn McKenna**

**Chair ELA Legislative and Policy Committee**

b.mckenna@unison.co.uk



